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In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1094

RUSSELL HAROLD SITTON and BARBARA SITTON,

versus *Petitioners,*

UNITED STATES OF AMERICA, ET AL,

Respondents.

Motion to Defer Certiorari and Refer Case to the Fifth Circuit for Additional Findings

Petition For a Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

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INDEX

Page

MOTION TO DEFER CERTIORARI AND REFER CASE TO THE FIFTH CIRCUIT FOR ADDITIONAL FINDINGS..... 1-6

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT..... 7-80

Opinions Below..... 8

Jurisdiction..... 8-9

Questions Presented..... 9-11

Constitutional Provisions, Statutes and Rules Involved..... 11

Statement of The Case.....12-18

- Fact Statement-Federal Court Proceedings..... 12
- Fact Statement-State Court Proceedings..... 14

Reasons for Allowing The Writ.....18-80

- Federal Law Controls Federal Obligations..... 18
- Wherever The United States Is A Party, The Federal Court Has Jurisdiction To Give Complete Relief..... 23
- Res Judicata Is Not The Supreme Law of The Land..... 32
- Constitutional Questions May Become Res Judicata Upon The Basis of Election Or Failure To Assert: Neither Applies To This Case..... 40
- The Higher Policy Must Prevail..... 42

Page

Recapitulation..... 43
Denial of Certiorari Is Not Decisive..... 45
Limitations Is Not A Bar..... 46
The Supreme Court Has Never Ruled on The Application of The Second Clause of The Seventh Amendment to The States..... 47
Early Cases Viewing The Relationship Between the Seventh and Fourteenth Amendments..... 48
FELA Cases in The State Courts..... 49
The Standard for Weighing The Verdict in Other Cases..... 51
The Fundamental Nature of the Amendments..... 55
Is Clause Two of the Seventh Amendment Fundamental?..... 57
Jury Trial Is of Historic and Continuing Strength..... 62
Arbitrary and Discriminatory Conduct Is Directly Violative of The Fourteenth Amendment..... 64
State Law..... 67
Mental and Physical Suffering..... 72
Certiorari Is Necessary To Protect The Integrity of Trial by Jury..... 75

Prayer..... 80

APPENDIX INDEX

Page

Decisions of the Supreme Court Since 1868 Discussing Applicability of Seventh Amendment Guaranties to State Court Litigation.....A-1 to A-7

Federal Court Proceedings ..... A-8 to A-21

- Judgment of U.S. District Court....A-8
- Notice of Appeal A-10
- Opinion of U.S. Court of Appeals...A-11
- Judgment.....A-20
- Extension of Time A-21
- Judgment on Petition for Rehearing.A-21

Trial Court Proceedings (State Court) ..... A-22 to 39

- Testimony of Daniel H. McMaster... A-22
- Testimony of Walter J. Moorman.... A-25
- Testimony of William Robert Trout. A-31
- Testimony of Kathryn H. Brown..... A-32
- Mrs. Brown Affidavit in Support of Motion for Summary Judgment.. A-36
- Testimony of Harry Clifton Summer, Jr..... A-37
- Testimony of Mrs. Barbara Sitton.. A-38
- Exhibits-Petitioners' Deed & Contract of Sale..... A-40
- Charge of the Court and Verdict of the Jury..... A-41
- Issues requested by Plaintiff and Refused by Court..... A-45
- Final Judgment..... A-45

Proceedings in the Court of Civil Appeals (State Court)..... A-48 to 63

- Appellants' Points of Error..... A-48
- Opinion of the Court..... A-50
- American Cross-Points 2,3,4, 5, and 10..... A-61
- Duckworth Cross-Points 9 & 10..... A-62

APPENDIX INDEX (Continued)

Page

Moorman Cross-Points 5,6,8 & 9.....A-62

Proceedings in the Supreme Court of Texas
.....A-63

Application for Writ of Error.....A-63

Order.....A-63

Constitutional Provisions, Statutes and Rules.....A-64 to 65

CITATIONS

Cases:

	Page
Abington School Dist. v. Schempp, 374 U.S.203	56
Atchison, T.&S.F.Ry.v. Wells, 265 U.S.101	27
Aetna Life Ins.Co. v. Ward, 140 U.S.76	52
Atlantic & Gulf Stevedores v. Ellerman Lines, 369 U.S.355	52
Bailey v. Central Vt.Ry., 319 U.S.350	51
Beacon Theatres v. Westover, 359 U.S.500	61
Bloom v. Illinois, 391 U.S.194	62
Brady v. Southern R.Co.,320 U.S.476	50
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S.673	66
Brown v. Mississippi, 297 U.S.278	65
Byrd v. Blue Ridge Cooperative,356 U.S.525	62
Chicago B.&Q.R.Co.v.Chicago, 166 U.S.226	56,61,65
Continental Ore Co. v. Union Carbide Corp., 370 U.S.690	52
Creswill v. Grand Lodge, 225 U.S.4	65
Dairy Queen v. Wood, 369 U.S.469	61
Davis v. Balkom, 369 U.S.811	46
Dennis v. Denver & R.G.W.R.Co., 375 U.S.208.	51
Dept. of Mental Hygiene v. Kirchner, 380 U.S.194	5
Dice v. Akron, C.&Y.R.Co.,342 U.S.359	75
Dick v. New York Life Ins. Co., 359 U.S.437.	51
Dill v. Ebey, 229 U.S.199	61
Duncan v. Louisiana, 391 U.S.145	62
Edwards v. Elliott, 88 U.S.532	49
Empire State-Idaho Mining Co. v. Hanley, 205 U.S.225	49
England v. Louisiana State Board of Medical Examiners, 375 U.S.411	29,40
Erie Railroad Co. v. Tompkins, 304 U.S.64	34
Fiske v. Kansas, 274 U.S.380	65
Fitzgerald v. United States Lines, 374 U.S. 16	61
Gallick v. Baltimore & O.R.Co., 372 U.S.108.	51
Galloway v. United States, 319 U.S.372, 407(Dissenting opinion)	78,80
Gibson v. Phillips Pet.Co., 352 U.S.874	53

Cases: Page

Green v. United States, 356 U.S.165(Dissent)..... 61
Griffen v. Griffen, 327 U.S.220..... 29,31, 35,39
Grunenthal v. Long Island R.R.Co.,393 U.S 156..... 63
Hanger v. Abbott, 73 U.S.532..... 46
Hansbury v. Lee, 311 U.S.32..... 35,39
Harris v. Penna.R.Co,361 U.S.15(Concurring opinion)..... 51,62
Hodges v. Easton, 106 U.S.408..... 75
Hovey v. Elliott, 167 U.S.409..... 35
Hyde v. U.S., 225 U.S.347..... 24
Irvin v. Dowd, 359 U.S.394..... 30
Jacob v. New York City, 315 U.S.752..... 60
The Justices v. Murray, 76 U.S.274..... 48,61
Kalb v. Feurstein, 308 U.S.433..... 42
Kennon v. Gilmer, 131 U.S.22..... 61
Kilbourn v. Thompson, 103 U.S.168..... 65
Lavender v. Kurn, 327 U.S.645..... 51
Magenau v. Aetna Freight Lines, 360 U.S.273. 62
Malloy v. Hogan, 378 U.S.1..... 57
Mapp v. Ohio, 367 U.S.643..... 56
McCullough v. Virginia, 172 U.S.102..... 66
Mercer v. Theriot, 377 U.S.152..... 53,64
Minneapolis & St.L.R.Co.v.Bombolis, 241 U.S.211..... 49,55
Minnesota v. National Tea Co., 309 U.S.551.. 5
O'Leary v. Brown-Pacific-Maxon,Inc.,340 U.S.504..... 40
Old Wayne Life Ass'n.v.McDonough,204 U.S.8.. 36
Panhandle Eastern Pipe Line Co.v.State Highway Comm.,294 U.S.613..... 65
Parsons v. Bedford, 28 U.S.433..... 47,58,61
Pearson v. Yewdall, 95 U.S.294..... 49
Pennoyer v. Neff, 95 U.S.714.....5,25,27,30,31,65
Postal Telegraph Cable Co.v.Newport, 247 U.S.464..... 35
The Protector, 76 U.S.687..... 46
Raymond v. Chicago Union Traction Co., 207 U.S.20..... 65

Cases: Page

Reid v. Covert, 354 U.S.1..... 61
Rogers v. Missouri Pac.R.Co.,352 U.S.500... 51
Rooker v. Fidelity Trust Co., 261 U.S.114.. 41
Rooker v. Fidelity Trust Co.,263 U.S.413...4,24,25, 26,28,31,32,41,45,75,76
Ross v. Jones, 89 U.S.576..... 46
Royal Ind.Co.v.United States, 313 U.S.289.. 19,20
St.L.&K.C.Land Co. v. Kansas City, 241 U.S.419..... 49
Schulz v. Penna.R.Co.,350 U.S.523..... 70
Schware v. Board of Bar Examiners,353 U.S. 232..... 66
Sheppard v. Maxwell, 384 U.S.333..... 30,46
State Tax Comm.v.VanCott,306 U.S.511..... 5
Simler v.Conner, 372 U.S.221..... 55,61
Smith v. Texas, 311 U.S.128..... 57
Springville v. Thomas, 166 U.S.707..... 61
Thompson v. Louisville, 362 U.S.199..... 65,66
Thompson v. Utah, 170 U.S.343..... 61
United States v. Carver, 260 U.S.483..... 46
United States v. Shimer, 367 U.S.374..... 19,20
United States v. Yazell, 382 U.S.341..... 19
Union Trust Co. v. Eastern Air Lines, 350 U.S.907..... 54
United Gas Pub.Serv.Co. v. Texas, 303 U.S.123(Concurring opinion)..... 50
Wagner Electric Co. v. Lyndon,262 U.S.226.. 41,49
Walker v. Sauvinet, 92 U.S.90..... 49
Wetmore v. Karrick, 205 U.S.141..... 26,36
Williams v. Carolina Life Ins. Co., 348 U.S.802..... 54

* * * * * * * * *

Bass v. Bailey, 172 F.2d 212(5th,1949)..... 38
Bass v. Hoagland, 172 F.2d 205(5th,1949)... 36,39
Carolina Life Ins.Co. v. Williams, 210 F.2d 477(5th,1954)..... 54
Continental Oil v. United States, 184 F.2d 802(9th,1950)..... 20
Eastern Air Lines v. Union Trust Co., 221 F.2d 62(D.C.1955)..... 54

Cases: Page

Denver Bldg.& Const. Trades Council v. N.L.R.B., 186 F.2d 326(D.C.1950)..... 43
First Natl.Bank v. Anglo-Oesterreichische Bank, 37 F.2d 564 (3rd,1930)..... 46
Hanna v. Home Ins.Co., 281 F.2d 298(5th, 1960)..... 26
Jones v. Hulse, 391 F.2d 198(8th,1968)..... 26,28
Manufacturers Record Pub.Co. v. Lauer, 268 F.2d 187(5th,1959)..... 26
McKnight v. United States, 259 F.2d 540 (9th,1958)..... 19,20
O'Boyle v. Bevil, 259 F.2d 506(5th, 1958).....30,38,39,64
Osbourne v. U.S., 164 F.2d 767(2nd, 1956).. 46
Phillips Pet.Co. v. Gibson, 232 F.2d 18(5th,1956)..... 52
Pilkinton v. Pilkinton, 289 F.2d 32(8th, 1968)..... 26
Resolute Ins.Co. v. No. Carolina, 397 F.2d 586(4th, 1968)..... 26
Spilker v. Hankin, 188 F.2d 35 (D.C.1951).. 43
Tribune Review Pub.Co. v. Thomas, 254 F.2d 883(3rd, 1958)..... 29
United States v. Wells, 403 F.2d 596 (5th,1968)..... 19,20
United States v. Seaboard Surety, 339 F.2d 1 (2nd,1964)..... 20
Warriner v. Fink, 307 F.2d 933(5th,1962)... 26
Williamson v. Puerifoy, 316 F.2d 774 (5th,1963)..... 26
Wood v. Conneaut Lake Park,Inc., 386 F.2d 121(3rd,1967)..... 26,28

* * * * * * * * *

Borovitz v. American Hard Rubber, 287 Fed.368(N.D.Ohio,1923)..... 46
Central Stikstof v. Pennsacola, 316 F.2d 189(5th,1963)..... 75
Olson v. Board of Education, 250 F.S.1000(E.D.N.Y.,1966)..... 29,42
Tribune Review Pub.Co. v. Thomas, 153 F.S.486(W.D.Pa.,1957)..... 42,45

Cases: Page

* * * * * * * * *

Cotton v. Cooper, 209 S.W.135 (Tex.Comm.App.1919)..... 73
Harris v. Trader's & General Ins. Co., 82 S.W.2d 750(Tex.Civ.App.1935)..... 73
Houston Elec. Co. v. Dorsett, 145 Tex.95,194 S.W.2d 546(1946)..... 74
International Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567(Tex.1963)..... 72
Johnson v. Lagow, 14 S.W.2d 818(Tex.Comm. App.1929)..... 72
Leyva v. Pacheco, 163 Tex.638,358 S.W.2d 547(1962)..... 65
Lloyd v. Brinck, 35 Tex.6(1871)..... 65
Patrick v. Badger, 41 S.W.538(Tex.Civ. App.1897)..... 72
Sitton v. American Ins. Co., 390 S.W.2d 34(Tex.Civ.App.1965)..... 15
Stafford v. Steward, 295 S.W.2d 665 (Tex.Civ.App.1956)..... 74
St. Louis & S.W.R.Co. v. Alexander, 106 Tex.518,172 S.W.709(1915)..... 74
St. Louis & S.W.R.Co. v. Thompson, 102 Tex.89,113 S.W.144(1908)..... 69,73
Sunderman v. Roberts, 213 S.W.2d 705 (Tex.Civ.App.1948)..... 71
West v. Slaughter, 384 S.W.2d 185 (Tex.Civ.App.1964)..... 65
Underwood v. Winkel, 249 S.W.1111 (Tex.Civ.App.1923)..... 69

* * * * * * * * *

Battalla v. New York, 10 N.Y.2d 237, 176 N.E.2d 729(1961)..... 74
Crisci v. Security Ins. Co., ____Cal.2d____, 426 P.2d 173(1967) 74
East Crossroads Center Inc. v. Melon Stuart Co., 245 F.S.191(W.D.Pa.1965).... 64

Cases: Page

Falzone v. Busch, 45N.J.559,214 A.2d 12(1965)..... 74
Lyndon v. Wagner Electric Co., 285 Mo.77(1920)..... 41
Wilkins v. Wilkins, (C.A.1896)L.R.P.108.... 43

CONSTITUTIONAL PROVISIONS, STATUTES & RULES

U.S. Constitution, Art.III, Sec.2..... 24
U.S. Constitution, 7th Amdt.....47,48,49,54,55, 57,60,61,62,79
U.S. Constitution, 14th Amdt.....48,55,57
28 U.S.C., §1652..... 34
38 U.S.C., §1803(c)(1)..... 18
38 U.S.C., §1820(a)(4)..... 10,75
28 U.S.C., §1254(1)..... 9
28 U.S.C., §2283..... 27
28 U.S.C., §1961..... 22
38 C.F.R., §36.4017..... 19
Texas Constitution, Art.I, Sec.15..... 11,64
Rule 290, Tex.Rules Civ. Proc..... 11
Rule 291, Tex.Rules Civ. Proc..... 11
Rule 324, Tex.Rules Civ. Proc..... 72
Rules 453-455, Tex.Rules Civ. Proc..... 68

TEXTS AND OTHER

35 Am.Jur.,Master and Servant, §415..... 50
Blackstone's Commentaries, Gavit Ed.689, 690.....58,59,67
Blum, Origin and Development of the Directed Verdict, 48 Mich.L.Rev.555(1950) 77
Comments: The Notary Public, 16 Baylor L. Review 388..... 15
Green, Duties, Risks, Causation Doctrines, 41 Tex.L.Rev.42,70-74(1962)..... 77
Green, Jury Trial & Mr. Justice Black, 65 Yale L.J.482,485-486(1956)..... 77
Green, Jury Trial and Proximate Cause, 35 Tex.L.Rev.357(1957)..... 77

Page

Green, Observations: The Importance of Identifying the Issue, 42 Tex.L. Rev.835,840(1964)..... 77
Green, Protection of Jury Trial in Diversity Cases, 35 Tex.L.Rev.768(1957).....53,75,78
Green, The Thrust of Tort Law:II, 64 W.Va. L.Rev.115,134-135(1962)..... 77
Green, Tort Law:Public Law in Disguise, 38 Tex.L.Rev.1,257,269(1960)..... 79
Holmes, The Common Law, Little, Brown & Co., 1938,P.3..... 66
Kalven, The Dignity of the Civil Jury, 50 Va.L.Rev.1055 (1964)..... 77
Kreindler, The Jury System in Tort Cases, 51 A.B.A.J.736(1965)..... 77
3 Moore's Federal Practice, §§0.405(3), 0.405(12), 0.406(2)..... 32,33
Sacks, Preservation of the Civil Jury System,22 Wash.&Lee L.Rev.76(1965)..... 77
Stern & Gresman, Supreme Court Practice, 4th Ed..... 2,68
Tongue, In Defense of Juries as Exclusive Judges of the Facts, 35 Ore.L.Rev. 143(1956)..... 77
Warren, The Hon.Earl, Civil Justice and the Jury (Foreword)..... 60
Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn.L.Rev.751(1957) 77

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Motion to Defer Certiorari and Refer Case to the Fifth Circuit for Additional Findings

---

Your movants, Russell Harold Sitton and Barbara Sitton, contended before the United States District Court for the Northern District of Texas and before the Fifth Circuit at New Orleans that prior litigation in the State Courts of Texas between petitioners and third party respondents, American Title Company, et al., could not be invoked as a bar to petitioners' claims for relief because those State Court proceedings failed to comply with the due process and equal protection guaranties of the Fourteenth Amendment.

Prior to the instant case, petitioners brought suit against third party respondents for conspiring together to alter the deed to the home which petitioners were purchasing under the G. I. Loan Program. The special issue (interrogatory) jury verdict was favorable to petitioners on every issue and they were awarded actual and exemplary damages aggregating $90,000.00. Thereafter, the State Court threw out the verdict and rendered a take-nothing judgment. Petitioners say that the State Court declaration of "no evidence to support any of the jury's findings" was simply a pretext to dispose of a case with which the Court personally disagreed. Petitioners urge that there was, as a matter of fact, ample evidence to sustain the verdict. Petitioners submit that the State Court proceedings were violative of the Fourteenth Amendment in that they were arbitrary and discriminatory and that they further violated the Seventh Amendment restriction that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Obviously, where a Federal Court recognizes and enforces a State Court proceedings as a final disposition of a controversy, then the Federal Court makes the judgment of the State Court into its own judgment. For this reason, it has been repeatedly held that the judgment of another tribunal may not be enforced unless the prior judgment complies with due process. None of the foregoing matters were considered in the opinion of the Fifth Circuit. The Court, in effect, held that it could go no further than the face of the State Court judgment.

We will be quite frank. Petitioners' entire case collapses unless there are facts in the record which uphold the petitioners' basic contention; i.e. that there was ample evidence presented in the State Court to support the jury's verdict. The rule is well established that the Supreme Court will not pass upon questions that are moot or abstract or not raised by the evidence. At the same time, the Supreme Court does not ordinarily grant certiorari to pass upon questions of fact. Before passing upon the petition for certiorari, the foundation stone of petitioners' case should be examined.

In their brief to the Fifth Circuit, petitioners presented the following point of error (Apts' Br.9):

> "POINT FIVE: The United States District Court erred in failing to examine the record of the Texas Court to determine if the proceedings complied with due process and equal protection of law."

Petitioners made the following statement (Apts' Br.4):

> "It is submitted that this appeal turns upon the two following questions:
>
> (1) If this case had originally been tried in the federal courts, was the evidence presented so weak that a federal court could have overriden the verdict without violating the jury trial provisions of the Seventh Amendment?

(2) In view of the jury trial provisions of the Texas Constitution and the Texas Rules and the fact that the jury was charged as the "exclusive judges of the facts proved," was the act of the Texas Courts in overriding the jury verdict so contrary to the established practices and procedures as to be 'fundamentally unfair?'

Appellants urgently request that the entire record be considered and that these questions be expressly answered. If they be answered in appellees' favor, appellants concede they have no recourse. It is submitted that if either of them be answered in appellants' favor, the case must be reversed."

We further urged: "In view of the probability of a certiorari petition by the losing party, we renew our request that the Court examine the record (Apts' Br.47)." The request was again made at Pages 62-63 of our brief.

Our request for findings of fact was renewed in the petition for rehearing. On Pages 4-7, we tendered specific findings of fact which we asked the Fifth Circuit to enter. All of this was overruled by the Fifth Circuit; sub silentio.

We urge in the within petition that a ruling of "no federal jurisdiction" is unprecedented in a case to which the United States is a party. The ruling of the Fifth Circuit severely impairs the power of the Federal Courts to give complete relief and constitutes a vast extension of the arbitrary and artificial rule laid down in Rooker v. Fidelity Trust Co., 263 U.S.413. Likewise,

the Court's cursory ruling of res judicata muddies the applicability of a long line of authorities running back to Pennoyer v. Neff, 95 U.S.714, holding that no judgment can stand as res judicata unless it complies with due process.

The Supreme Court may elect to pass upon the points of law in the annexed petition in a vacuum. It may elect to pass upon the law and the facts together. The only other alternative is to return the case to the Fifth Circuit for an examination of the facts. At the same time, if necessary, the Fifth Circuit can be instructed to determine whether there exists any substantive principle of state law, apart from questions of evidence, that will support the State Court's judgment. We say there are none. If the Fifth Circuit disagrees and finds novel and important questions of law, it could invoke the abstention doctrine.

Numerous State Court decisions have been returned to the Court below for clarification. Minnesota v. National Tea Co., 309 U.S.551; State Tax Commission v. Van Cott, 306 U.S.511; Dep't of Mental Hygiene v. Kirchner, 380 U.S.194. There is no reason that a case should not be returned to the Federal Circuit for clarification whenever the same would assist the Supreme Court in its disposition of the case. The Supreme Court's jurisdiction over the Courts of Appeals "is of an extremely comprehensive nature." Stern & Gressman, Supreme Court Practice, 26.

WHEREFORE, premises considered, petitioners ask that consideration of the annexed petition for certiorari be deferred

and that this case be referred back to the United States Court of Appeals for the Fifth Circuit upon such conditions and with such instructions as the Court may deem proper.

RESPECTFULLY SUBMITTED,

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In the

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Petition For A Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

---

Your Petitioners, Russell Harold Sitton and Barbara Sitton, respectfully petition for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in its cause No. 25,685 styled as above.[1]

---

1. Following is a complete listing of the respondents hereto: The United States of America, American Title Company, American Insurance Company, Trinity Universal Insurance Company, Lawyers' Surety Corporation, Katherine H. Brown, Jarvis Brown, Leonard C. Duckworth, Leonard C. Duckworth Agency, Harry Clifton Summer, Jr., and Mr. and Mrs. Walter J. Moorman.

OPINIONS BELOW

The opinion of the Fifth Circuit(A-11 to A-20 herein) is reported at 413 F.2d 1386 and the opinion of the Texas Court of Civil Appeals (A-50 to A-61) is reported at 396 S.W.2d 899. This Court has previously denied a petition for certiorari directed to the Texas Court. 385 U.S.975; 385 U.S.1033. Neither the U.S. District Court nor the Texas Supreme Court rendered an opinion.

JURISDICTION

This is an appeal from a summary judgment of the United States District Court for the Northern District of Texas rendered November 2, 1967(A-8 to A-10). Petitioners filed notice of appeal November 27,1967(A-10). The judgment (A-20)and opinion (A-11) of the Court of Appeals were both dated and entered July 30, 1969. Two extensions of time to petition for rehearing were granted (A-21), the last extension running through September 4, 1969. Petition for rehearing was filed on September 2, 1969 and overruled on October 22, 1969 (A-21).

Petitioners submit that they have been deprived of rights secured to them by the Fourteenth Amendment to the United States Constitution. In addition, the Texas Court held that petitioner, Sitton, is barred from recovery against third party respondents because of his supposed failure to apply to the Veterans' Administration for

hardship relief and the Court below held that he must pay six per cent (6%) interest on the within judgment even though V.A. regulations only call for four per cent(4%) on mortgage deficiencies. Both rulings call for construction of the Servicemen's Readjustment Act of 1944, as amended, and regulations pursuant thereto. Petitioners rely on 28 U.S.C., § 1254(1) to invoke the jurisdiction of this Court.

QUESTIONS PRESENTED

NOTE: How many questions should be presented in a writ application? We have been cautioned that to present too many questions is to invite the Court to disregard them all. However, we regard each of these questions as important and substantial and here present them to the Court knowing that the Court can and will restrict the writ only to the questions it decides should be heard.

One

Must a federal court adopt prior state court proceedings as res judicata even when the state judgment violates the guaranties of the Seventh and Fourteenth Amendments?

Two

Where the United States is a party to a case in the federal court and one of the parties invokes the previous judgment of a state court, is the federal court without jurisdiction to hear a claim that the state court proceedings violate the Seventh and Fourteenth Amendments?

Three

Does the Fourteenth Amendment require that the states observe the Second Clause of the Seventh Amendment providing that no fact tried by a jury shall be examined otherwise than according to the rules of the common law?

Four

Without weighing the credibility of the witnesses, is this a case where there is in the evidence, no room whatever for honest difference of opinion over the factual issue in controversy?

Five

Alternatively, was the action of the Texas courts in declaring that there is "no evidence" to support the jury's verdict so lacking in support that to give it effect would work that fundamental unfairness which is at war with due process and equal protection of the law?

Six

Did the Texas Court of Civil Appeals err in holding that a veteran who elected not to invoke the hardship provisions of 38 U.S.C. § 1820(a)(4) is barred from seeking relief from third parties for either:

(1) the amount of the mortgage foreclosure deficiency; or,

(2) any other damages resultant to the foreclosure of his G.I. loan?

Seven

When judgment is rendered against a veteran for a mortgage foreclosure deficiency, what rate of interest should apply, the rate

fixed by the Veterans' Administration or the rate fixed by the state law respecting judgments in general?

Eight

Can any part of petitioners claims be constitutionally held as barred by limitations?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED
(Text at A-63 to 65)

The United States Constitution, Article III, Section Two

The United States Constitution, Amendment Seven

The United States Constitution, Amendment Fourteen, Section 1

28 U.S.C., § 1254(1)

38 U.S.C., § 1803(c)(1)

38 U.S.C., § 1820(a)(4)

Texas Constitution, Article I, Section 15

Rule 290, Tex.Rules Civ.Proc.

Rule 291, Tex.Rules Civ.Proc.

STATEMENT OF THE CASE

FACT STATEMENT - FEDERAL COURT PROCEEDINGS

The Court of first instance in the present case was the United States District Court for the Northern District of Texas. The present suit was instituted by the government and federal jurisdiction is based on the presence of the United States as a party and the power of the federal courts to give complete relief after taking jurisdiction.

In the interest of brevity, the facts presented in the foregoing Motion to Defer Certiorari, etc. and the facts stated in the opinion of the Fifth Circuit will not be repeated. We wish to supplement the opinion in the following respects:

Our third party complaint should not be misconstrued. It was not simply a plea that the Federal Court "render such judgment against third party defendants as the State Court should have rendered" (A-17) We alleged our cause of action in full, pretty much the same fashion as it was alleged in the State Court. Petitioners alleged their damages and requested a jury trial upon the merits. Only as an alternative plea did petitioners ask to recover upon the State Court jury verdict. The State Court proceedings was first invoked not by petitioners but by third party respondents. They pleaded the State Court judgment as res judicata and further contended that petitioners were asking the Federal Court to "exercise appellate jurisdiction" over the State Court.

When third party respondents filed for summary judgment, petitioners answered in part as follows:

> "On November 20, 1964 third party plaintiffs' cause of action was tried in the state court. Mr. and Mrs. Sitton, the plaintiffs therein, were entitled to a jury trial under the applicable law and a jury was duly called. The jury, after being charged 'You are the sole judges of the facts proved' returned a verdict entirely in third party plaintiffs' favor. However, the state courts refused to enter judgment thereon, thereby denying due process of law and equal protection of law under Article I, Sections 15 and 19 of the Texas Constitution and Amendments 7 and 14 of the United States Constitution."(R.250)

The entire record of the State Court proceedings was incorporated into petitioners' answer to motion for summary judgment by reference (R.252,254-255). The entire State Court record was filed as an exhibit (R.280) and has been brought up to this Court.

Your petitioners also moved for summary judgment(R.256-266) pleading that the jury verdict rendered in the State Court entitled petitioners as a matter of law to recover a judgment of indemnity for all amounts adjudged in the government's favor together with the actual and exemplary damages totaling $90,500 which the State jury had awarded to petitioners plus state and federal court costs and interest from January 21, 1965, the date of the state trial court's judgment. In short, petitioners asked to recover the amount of the verdict which was taken away

by the Texas Court without due process. Alternatively, petitioners renewed the plea of the complaint that they have a trial of the facts before a jury in the Federal Court. (R.72)

Even though the entire State Court record was before them, and even though these petitioners have extensively briefed to both courts the facts disclosed by that record, the U.S. District Court and the Fifth Circuit have each declined to consider the State Court proceedings. In effect, they have held that they must regard the State Court judgment as conclusive on its face alone.

FACT STATEMENT-STATE COURT PROCEEDINGS

The entire State Court record is presently before the United States Supreme Court and we request that it either be examined here or be referred back to the Fifth Circuit. Likewise, we shall not repeat matters contained in the opinion of the Texas Court of Civil Appeals except to clarify defects and inadequacies in that opinion. Assured by numerous citations that previous denial of certiorari is not decisive, we make no pretensions in that respect. The portions of this petition that are set in printer's type are reproduced directly from our previous petition.

The appendix contains numerous extracts of testimony and a copy of the forged deed (A-40). The evidence is further developed under the topic "What the Record Reflects."

Russell H. Sitton, a veteran of the Korean conflict, conveyed the home which he had purchased under the Servicemen's Readjustment Act of 1944 to Walter J. Moorman, plumbing contractor and real estate investor. He later brought action for conspiracy asserting that the real estate broker and title company who solicited his confidence and upon whom he relied, joined together with his grantee, misrepresented the transaction and committed forgery upon his deed.[2]

The key witness for the plaintiff was a loan service representative of the Veterans Administration, an unimpeached and unbiased witness who testified that both grantee Moorman and the vice-president of the title company admitted everything to him:

> "Q. * * * I believe, that it is your testimony that Mrs. Brown told you she had changed the deed? A. At Moorman's request, yes. * * * Moorman told me he had her do it and she told me she did it" (A-25).

For a full abstract of this testimony, refer to pages A-22 to 25. The Court's opinion ignores this testimony except to label one statement therein as "clearly hearsay" (A-55 & 56). Petitioners say the ruling is untenable. Even so, the Court's opinion further reflects the uncontrovertible facts that the alteration was made at grantee Moorman's request while the instrument was in the office of Mrs. Brown, the vice president and branch manager of the title company, and

[2] The notarial surety was dismissed before trial on the holding that for a notary to alter an instrument after executing his certificate and before the delivery thereof is not official misconduct. *Sitton v. American Ins. Co.*, 390 S.W. 2d 34 (Tex. Civ. App. 1965). Such holding has been described in Comments: The Notary Public, 16 Baylor L. Rev. 388, 395 as "an anachronism."

while it was under her dominion and control. The Court apparently took the position that petitioners have not sufficiently rebutted the possibility that it was all an innocent mistake.

Twenty-one (21) special issues (interrogatories) were submitted to the jury (A-41 to 45). It was charged that it was "the exclusive judges of the facts proved," the "credibility of the witnesses" and the weight of their testimony (A-41). It returned a verdict *entirely favorable* to the plaintiffs and awarded substantial actual and exemplary damages. Nevertheless, a judgment *non obstante veredicto* was rendered by the trial court and affirmed by the Court of Civil Appeals.

The Court's ruling in part was as follows:

> "Appellants * * * assert that the judgment *non obstante veredicto*, having been rendered * * * in the face of evidence of probative force * * * denied appellants due process and the equal protection of law guaranteed to them by * * * the Seventh and Fourteenth Amendments to the United States Constitution. The argument under these points does no more than * * * accuse the trial court generally of substituting its fact determination for that of the jury. Our attention is directed to no specific evidence supporting any part of the verdict; nor is it demonstrated how appellants' said constitutional rights were violated. Our examination of the record discloses to us no such evidence and no such violation" (A-60).

We submit the diametric contrary. We cannot visualize a stronger case of conspiracy. If the proofs in this case failed to even present issues worthy of the jury's consideration, we cannot hypothetically state any proofs that could have carried the case to the jury.[3]

[3] The Court's only reference to respondent Summer was to point out that petitioners had testified "that they were assured" by Summer and his assistant "that Moorman would assume the debt" (A-53). Respondent Moorman was obviously unwilling to do so and the representations were, to say the least, incorrect. The rela-

It is to be emphasized that petitioners have three independent claims for damages and they have been denied them all and have been adjudged responsible for court costs aggregating $1339.80 as well. (R. 263-266) Petitioners have been denied of:

(1) Actual damages for "the amount of the deficiency due under the note in question after the foreclosure" (A-59).

(2) Actual damages for mental anguish and physical suffering.

(3) Exemplary damages appurtenant to either or both claims for actual damages.

There is considerable divergence of opinion regarding the circumstances under which damages for mental suffering will be allowed, but they are allowable to some extent in almost every jurisdiction. The Court's opinion concedes that in Texas the right to recover such damages is "well settled" (A-57). The matter is of no concern at this point because (1) there are other damages in the case and (2) the court chose to lay the case on a supposed lack of evidence. In refusing to allow recovery of the mortgage deficiency, the Court said:

> "Appellants complain * * * of the failure of the trial court to render judgment for the foreclosure deficiency, the amount thereof being uncontroverted. Appellants having relied exclusively on the theory of conspiracy to establish any liability against appellees,

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tionship between the parties strongly indicates that the real estate broker was not misled by his customer. There is considerably more evidence in the record concerning respondent Summer which we developed in our amended brief, pp. 21-25, 34-38 and in our motion for rehearing, pp. 5-7, 20-22 before the Court of Civil Appeals. Both these documents have been filed in this Court

We will not go into further detail here because a conspiracy is composed of "two or more persons" (Brown and Moorman) and the substantial body of circumstantial evidence concerning Summer is not material to the granting of this petition.

and this court having held that there was no evidence of a conspiracy to alter the deed in question, or of alteration of the deed as a result of conspiracy, it follows that there was no reversible error [in denying recovery]." (A-59 & 60)

It is to be further emphasized that petitioners have been totally deprived of their day in court. The circumstances under which new trials may be granted or remittiturs ordered on pain of new trial are not in the case because no such action was taken.

REASONS FOR ALLOWING THE WRIT

FEDERAL LAW CONTROLS FEDERAL OBLIGATIONS

We present the rate of interest question first because it is concise and because we wish to demonstrate that it is an important point of first impression. We have no exact statistics at hand, but surely millions of loans have been made under the G.I. Loan Guaranty Program. The Assistant U.S. Attorney stated to counsel during the trial court proceedings that in his files alone, there were several hundred G.I. mortgage deficiency cases. Multiply this by the number of federal district courts in the land and it is immediately apparent that millions of dollars are involved. Much of this money must come from those who can ill afford to pay. Every penny of additional interest will be taken from those who have honorably served their country on the field of battle.

The government's own pleadings (to which it is bound) state that interest "continues to accrue" at 4% "pursuant to V.A. Manual MP-4, Part V, DVB supplement, Par. 2G.05(9/30/57)" (R.61). By 38 U.S.C. § 1803(c)(1), the

Administrator of Veteran's Affairs is ordered to fix interest rates and the rate fixed is 4%, 38 C.F.R., §36.4017. Nevertheless, the judgment calls for interest "from this date at 6%(R.63)."

At the outset of its opinion while discussing the liability of Mrs. Sitton, the Court clearly acknowledged the general principle that federal law ordinarily governs federal obligations. It stated that only when there are overriding considerations of policy will a contrary rule be applied. Such considerations were found present in United States v. Yazell, 382 U.S.341: "Each state has its complex of family and family-property arrangements. * * * We have no federal law relating to the protection of separate property of married women. We should not here invent one."

Yazell is the exception. United States v. Shimer. 367 U.S.374; McKnight v. United States, 259 F.2d 540(9th 1958); and United States v. Wells, 403 F.2d(5th 1968), establish the rule. A veteran's obligation is a federal obligation governed by federal law. The Court cited these authorities at the outset of its opinion, but disregarded them on the rate of interest and declared, without supporting authority, that a "clearer expression" of Congressional intent would be required in order to apply federal law. We say there is a presumption that federal law applies.

While there are no cases specifically concerning interest on G.I. loans, it is well established that, in general, interest on federal obligations is a matter of federal law. The leading case is Royal Ind.Co. v. United States, 313 U.S.289:

> .the rule governing the interest to be recovered as damages for delayed payment of a contractual obligation to the United States is not controlled by state statute or local common law. In the absence of an applicable federal statute, it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for non-payment of the amount found to be due.

The Royal case was cited as controlling in Continental Oil v. United States, 184 F.2d 802(9th 1950), and in United States v. Seaboard Surety Co., 339 F.2d 1(2d 1964). Royal obviously sets up two classifications, first where there is an applicable federal statute and, second, where there is none; but federal law controls in each instance.

We say that Mr. Sitton's obligation falls in the first classification. Congress has ordered the Administrator of Veteran's Affairs to establish a rate and the 4% rate established by the regulations has the force of a United States Statute.

Even if the regulation is not to be considered the equivalent of a statute, the 4% rate should still apply. In Royal, this Court held that "a fair rate is * * * appropriate" and under the circumstances of that case the "rate prevailing in the state" was found to be fair. Justice Black dissented that the rate was too high, that a smaller rate would be "fair and equitable", and urged that any rate established should be "national in its scope," which is the precise holding in Shimer, Wells and McKnight. Obviously, the only method of establishing a rate "national in its scope" would be to adopt the 4% rate set by the Veteran's Administrator.

We present that the Court below failed to recognize that the Servicemen's Readjustment Act and regulations thereunder are not part of a money-making scheme. To the contrary, they are designed to confer a special benefit on a special class; namely, veterans. Obviously, the Administrator set a 4% rate because he considered that it would be "fair and equitable" to the Treasury. A glance at the financial pages of any newspaper will show that even today, the Treasury has outstanding billions in bonds that pay 4% or less.

In deciding that 4% was compensatory, the Administrator was exercising his Congressional authority. His finding, unless challenged as arbitrary and discriminatory, is conclusive. Why in this world would a 4% rate be "fair and equitable" to the Treasury before judgment, but not after judgment? Mr. Sitton earned his G.I. benefits in the service of his country. From what part of the law or regulations can one infer an intent to abandon the beneficiaries of this special legislation at the courthouse door?

Regarding the "congressional intent to benefit veterans," may we emphasize that the regulation of interest rates chargeable to veterans is a vital part of the entire G.I. loan program. Every piece of veterans' loan legislation has either expressly set interest rates or has mandatorily enjoined the Administrator of Veteran's Affairs to do so.

Bear in mind that, through its usury laws, every state regulates the rate of interest chargeable to its residents <u>before</u> judgment as well as <u>after</u> judgment. Beyond doubt, Congress was dissatisfied to leave

the regulation of interest rates before judgment to state law. To us, it is inconceivable that Congress intended to relegate the matter to the vagaries of state law after judgment.

The statute fixing interest on Federal Court judgments at the state rate is salutary in general because the rate of interest should not be governed by the choice of forum. But, the government has never previously been held subject to 28 U.S.C. §1961. The Court has failed to recognize two universally acknowledged rules of statutory construction: First, the particular controls over the general. V.A. laws and regulations should be applied here because they are specifically designed to cover veterans' obligations to the United States Treasury. Second, laws of general application do not apply to the sovereign unless expressly provided to the contrary.

Essential matters, such as the rate of interest to be charged, should not be left to the vagaries of state law. In Wells, it was declared "the application of federal law is particularly needed to insure the uniform administration of the nationwide Veteran's Administration program." How can one infer an intent on the part of Congress or the Administrator to require a veteran in one state to pay a different rate of interest than a veteran in another state.

The way that interest rates are snowballing, V.A. regulations may soon call for 7% or 8% on mortgage deficiencies.

Will this Court still hold that a 6% state rate applies? We earnestly submit that had the rates been reversed, the state law calling for 4% and the V.A. regulations calling for 6%, the Court would have unquestionably applied the federal law. The opinion calls for state law to apply unless there is a "clear expression" to the contrary. This is the first decision that we can find invoking a presumption that state law should govern over federal law. Obviously, the government has argued for the application of state law because it deprives Mr. Sitton of the benefits of the V.A. regulations. The Court should not have allowed a deserving veteran to be whipsawed in this manner.

WHEREVER THE UNITED STATES IS A PARTY, THE FEDERAL COURT HAS JURISDICTION TO GIVE COMPLETE RELIEF

We feel that this Court will first wish to know the errors that were committed by the United States Court of Appeals for the Fifth Circuit. For this reason, we are briefing the case in inverse order, from the last event to the first. We shall conclude by showing that the State Court denied petitioners' constitutional rights by overturning a valid jury verdict. Immediately below we present that the State Court judgment cannot stand as res judicata. Although they are closely interrelated, the law of res judicata and the law of federal jurisdiction are completely separate. The Court failed to make this

distinction. Even if the decision of the State Court were res judicata many times over, the facts are that this case reeks with federal jurisdiction. "The Judicial Power shall extend * * * to Controversies to which the United States shall be a party." U.S. Const., Art. III, Sec. 2. It can hardly be better settled than that once having acquired jurisdiction of a cause of action, the federal courts have jurisdiction to give complete relief. The Court misconstrued Rooker v. Fidelity Trust Co., 263 U.S. 413. The other cases in the Court's opinion are all lower court cases following Rooker. The cases are completely distinguishable from the case in bar.

(1) In Rooker, the plaintiff relied upon the allegedly unconstitutional action of the state court as creating federal jurisdiction.

(2) Petitioners rely on the presence of the United States as a party to invoke federal jurisdiction.

> "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." Holmes, J. in Hyde v. U.S., 225 U.S. 347, 384.

The proposition that "federal courts have no authority to act as an appellate arm of the state courts" is a beautiful generality. On the one hand, it is so obviously correct that it forbids elaboration. On the other hand, it is so abstract that it proves little or nothing. The channels for appellate review are clearly spelled out. The federal courts have neither the desire nor the power to take over the functions of the state appelate courts any more than they have the

desire or the power to take over the functions of local school boards, police forces, commissioners' courts and legislatures. The federal courts not only have the power, but they have the duty to require that all of these local government units observe the mandates of due process.

It has never been suggested that in deciding the Rooker case, this Court intended to abandon or overrule that venerable authority, Pennoyer v. Neff, 95 U.S.714. In Pennoyer, there was a state court judgment against Neff and his land was sold by the sheriff to satisfy that judgment. Neff then brought a federal court suit to recover his land. He obtained federal jurisdiction on the grounds of diversity. Just as the third party defendants at bar invoked the state court judgment as their defense in the federal court, the defendant there invoked the state judgment as his defense. Did the federal court dismiss on the grounds that "a federal district court has no original jurisdiction to reverse or modify the judgment of a state court" as declared herein? Obviously not. The federal courts there proceeded to examine the state court record and hold the proceedings to be wanting in due process.

Is there a distinction between Pennoyer and Rooker? We say, "Yes". In Pennoyer, the federal court had jurisdiction on the grounds of diversity, while in Rooker it was contended that the allegedly unconstitutional procedures created federal jurisdiction. Admittedly, the language of Rooker is quite broad, but the Court is certainly familiar with the following elementary principle of judicial construction:

> "The Palmyra, like every other case, must be read in the light of the point to be

decided in the case." Wetmore v. Karrick, 205 U.S.141,155.

We have examined all of the authorities cited by the Court and by third party appellees and have gone some distance on our own. We believe this to be the first case on record dismissing for want of federal jurisdiction in a case where the United States is a party. The Fifth Circuit did not grasp the distinction between cases where the parties rely on the deprivation of a constitutional right by a state court as creating jurisdiction, and those cases where jurisdiction exists on independent grounds. We say this because the Court in its opinion has lumped both kinds of authority together. In Hanna , Williamson, Manufacturers, Jones, Pilkinton, Wood and Warriner,[3a] there was no jurisdiction under the Rooker test. We agree that those cases should have been dismissed.

The Court cited only one case where there were independent grounds of federal jurisdiction as in the case at bar. Resolute Ins.Co. v. North Carolina, 397 F.2d 586(4th,1968) It appears that there was diversity jurisdiction in that case. We submit that such case falls into that rather substantial category where the result was entirely correct even though some of the language was clearly inappropriate.

Of the foregoing cases cited in the opinion below, only Resolute is anywhere near in point. Please notice that in Resolute

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3a. Hanna v. Home Ins.Co.,281 F.2d 298 (5th,1960); Williamson v. Puerifoy,316 F.2d 774 (5th,1963); Manufacturers Record Publ.Co.v. Lauer,268 F.2d 187(5th,1959); Jones v. Hulse, 391 F.2d 198(8th,1968); Pilkinton v.Pilkinton, 389 F.2d 32(8th,1968); Wood v. Conneaut Lake Park,Inc.386 F.2d 121(3rd,1967); Warriner v. Fink,307 F.2d 933(5th,1962).

the claim was also barred by the Federal Anti-Injunction Statute, 28 U.S.C., § 2283. Take note of the fact that the Fourth Circuit found that no constitutional right had been denied as a matter of fact, a ruling that the Court below would not entertain. Please also notice that the Court did not hold that there was a lack of federal jurisdiction, but dismissed for failure to present a "justiciable controversy." We do not seek to draw any fine nuances of distinction, we simply point out that in Resolute, the Court declined to flatly declare the case without federal jurisdiction as has been done here.

We heartily agree that the lower federal courts have no appellate jurisdiction over state courts. Nevertheless, they have ample jurisdiction to examine the nature and effect of state court judgments. Particularly, ever since Pennoyer v. Neff, the federal district courts when clothed with jurisdiction on independent grounds, have had the authority to examine state courts' judgments for compliance with due process. There are many cases. Knowingly or unknowingly, the Court below extended our listing with its footnote citation of Atchison, T. & S. F. Ry. v. Wells, 265 U.S. 101. In that case, the plaintiff, through garnishment, obtained a Texas judgment against a non-resident. The defendant later brought suit in the federal court to enjoin the enforcement of the judgment. Did the Court there hold that federal courts have "no authority to act as an appellate arm of the state courts?" To the contrary, the judgment was held void as an undue burden on interstate commerce. We might further point out that the garnishee which was clearly the subsidiary, alter ego and other self of the defendant had already raised and had already been overruled on the identical point

in the state court and no appeal was taken.

The Court might have felt Wood v. Conneaut Lake Park, Inc., to be close in point because it involved a judgment n.o.v. The resemblance is superficial. The Court there plainly stated that it was without diversity or other conventional grounds of federal jurisdiction. The appellant there did not invoke the Seventh Amendment, but grounded his constitutional claim on an assertion that the state court rulings were arbitrary and discriminatory. However, the federal court held that any errors that were manifested fell within the mere error rule. The case gives support to petitioners because it was clearly indicated at Point 3 that if the state court was guilty of unconstitutionally arbitrary action, the federal court would give relief. Petitioners have so contended throughout. Also, in the Court's citation of Jones v. Hulse, please note that the Eighth Circuit there stated that federal courts might give relief "under appropriate circumstances."(p.202)

May we again point out that the Court has quoted our plea "that this Court render such judgment against third party defendants as the State Court should have rendered" but it has wholly failed to recognize the very next line where petitioners pleaded "alternatively, that a plenary trial on the merits be held"(R.72). As we see it, the motions to dismiss cannot reach petitioners plea for a plenary trial of the facts stated in the complaint. Contrary to Rooker, we do not need to allege or prove the irregularity of state proceedings to invoke jurisdiction. If the present case is tried before the Federal Court without considering or dis-

cussing or referring to any state court proceedings, how can it be contended that such a trial constitutes "appellate review" of state court proceedings? While their argument is not entirely clear to us, it is our understanding that respondents concede (R.43-45) that their motions to dismiss run only to your petitioners' plea to enforce the State Court jury verdict, the same as a judgment from another state or district court might be enforced through suit in the Federal Court(R.71,260) which plea is the basis of petitioners' motion for summary judgment, only one of the alternative pleas submitted.

Griffin v. Griffin, 327 U.S.220, was an action to recover on a state court judgment. Rather than hold "Federal Courts have no jurisdiction over state courts," the Supreme Court held that no other jurisdiction shall give effect to a judgment elsewhere acquired without due process. And yet, the case in bar has been dismissed on the strength of prior state proceedings even though other grounds of jurisdiction are present. Even though the Court below was numerously requested to do so by original brief and again by petition for rehearing, it steadfastly declined to examine the State Court record for failure to comply with due process. In effect, the Court held that it would recognize and enforce the State Court judgment whether or not it complied with due process.

Likewise, the cases of England v. Louisiana State Board of Medical Examiners, 375 U.S.411, Tribune Review Pub.Co.v.Thomas, 254 F.2d 883(3rd,1958) and Olson v. Board of Education, 250 F.Supp.1000(EDNY,1966)were each cases where there had been prior state

court proceedings. As in the case at bar, there were independent grounds of federal jurisdiction in each. None of them was dismissed on any holding of "no appellate review;" the jurisdictional grounds in each instance being a federal question unrelated to the state court proceedings. Additionally, may we point out that jurisdiction of federal district courts to review state court criminal proceedings for compliance with due process is beyond dispute. Sheppard v. Maxwell, 384 U.S.333; Irvin v. Dowd, 359 U.S.394.

And, may we particularly mention O'Boyle v. Bevil, 259 F.2d 506(5th,1958), a situation virtually on all fours with Pennoyer, where the Court found that it had diversity jurisdiction and proceeded to examine a state court judgment for compliance with due process.

Summary: If the courts of Texas have deprived the Sittons of any constitutional rights, then the federal courts have deprived petitioners of those identical self-same constitutional rights because the federal courts have bottomed their ruling solely upon the outcome of state court proceedings, blindly and unswervingly following the state judgment and steadfastly refusing to consider any claim of constitutional defect therein. Whatever rights were denied to Russell and Barbara Sitton in the State Court have now been denied to them in the Federal Court.

Supreme Court Rule 19 indicates that a "special and important" reason for the grant of certiorari exists "where a court of appeals has rendered a decision in conflict * * * with applicable decisions of this Court." The within decision holding that even though the United States is a party, there is no federal jurisdiction to

examine state court proceedings for compliance with due process cannot be reconciled with Pennoyer v. Neff or Griffin v. Griffin. The case constitutes a questionable and unwarranted extension of Rooker v. Fidelity Trust Co. far beyond its original terms.

May we also point out that the Rooker decision is almost fifty years old and the Supreme Court has not visited it since. We challenge the Court to look beyond the "encysted phrase" of "no appellate review". The Fourteenth Amendment applies to each and every state agency, courts included; it is a limitation upon the exertion of every power and authority possessed by state officials. Why should the local federal courts possess jurisdiction to prevent deprival of due process by state courts in criminal cases but not in civil cases even when these local federal courts have ample jurisdiction to control the deprival of due process by every other state official? If Rooker is properly analysed, it is immediately apparent that the case is not a decision regarding jurisdiction at all. The case is a declaration of policy. We submit that under the Constitution, the federal courts in each locality were, are and always have been clothed with the naked power to prevent state courts from denying due process. In Rooker, a restriction was placed upon the authority of the local federal courts to exercise their jurisdiction.

The mode of life has obviously changed since 1923 and the federal judicial system has changed apace. In 1923, the Supreme Court felt that appellate review through the state courts up to the Supreme Court of the United States was ample means for the review

of state court decisions in civil cases. Thus, the declaration of policy in Rooker. Since Rooker, there is still only one Supreme Court but not only the population and the number of courts, but the entire due process concept has burgeoned tremendously.

Is the declaration of policy contained in Rooker v. Fidelity Trust Co. still applicable in this year 1970? We do not know. We regard the edifice as archaic but we only seek to prevent its extension, not to dismantle it. We do know that Rooker has never been applied and was never intended to apply as an overruler of the Pennoyer case, or any other case where there are independent grounds for federal jurisdiction. We strongly question whether Rooker is in harmony with present day constitutional policy. Certainly its extension to cases where the United States is a party is an unwarranted and unwholesome restriction upon due process of law and should be reversed.

RES JUDICATA IS NOT THE SUPREME LAW OF THE LAND

While the opinion contains a whole buckshot load of citations on the jurisdiction question, it contains no case law on the res judicata question, which to our minds is the real nitty-gritty of the case. It is no reflection on Moore's Federal Practice to say that text books are a fine point of departure but they are rarely specific enough to decide a disputed question of law. We have examined Section 0.405(3) cited by the Court and find nothing in the caption or text thereunder very close to the question in hand. To illustrate our point that citations of texts prove

little or nothing, may we draw the Court's attention to Section 0.405(12) entitled "Danger of Inflexibility:When the Equity of the Rule Should be Applied" or even more particularly, Section 0.406(2) entitled "Relation to Due Process, Separation of Powers and Other Constitutional Doctrines." Most of the cases relied upon in the following argument are cited in those later sections. We submit them as controlling.

Again, we are arguing the case in inverse order. Please assume for the time being that the State Court did what we say it did--violated the rights of petitioners under the Seventh and Fourteenth Amendments by throwing out a valid jury verdict upon the pretext that there was no evidence to support it. The Federal Courts have now denied petitioners of those selfsame rights by treating the State Court judgment as conclusive on its face. We now reach the following proposition:

(1)This Honorable Court cannot apply both the Seventh Amendment and the rule of res judicata. It must choose between the two. Which is of the higher order?

(2)In making its choice, the Supreme Court must bear in mind that jury trial and the clause against re-examination of jury verdicts is a principle of constitutional law while res judicata is founded on nothing more than judicial policy.

(3)As we submit below, the rule of res judicata is neither monolithic nor inflexible nor unyielding. The courts have numerously refused to apply res judicata when to do so would (a) defeat federal policy or (b) produce an unjust result.

Res judicata is judicial law, not constitutional law. It is founded upon the principle that litigation should come to an end after the parties have had a reasonable opportunity to assert their claims. Petitioners have not been provided with a reasonable opportunity to assert their claims because the state court refused to recognize a valid jury verdict. Decisional law, i.e. res judicata, must give way when it stands in the path of constitutional law, i.e. due process.

The full faith and credit clause of the Constitution requires that the judgments of one state be honored in another state, but such clause is not directly applicable to the federal courts. The federal courts are required to observe state court decisions under Erie v. Tompkins and and under the Rules of Decision Act, 28 U.S.C. § 1652 providing:

> "The laws of the several states, except where the Constitution * * * otherwise requires(s), or provide(s) shall be regarded as rules of decision in civil actions in the courts of the United States."(our emphasis)

Clearly, the permissible limits of res judicata between the state and federal courts is written into the face of the Rules of Decision Act. It is an elementary principle of constitutional law that the state and federal courts are dually autonomous. While state court pronouncements of state law are paramount, the federal courts are the final arbiter of the United States Constitution.

Beyond question, the federal courts

are not required to accept state court rulings as final and conclusive when they concern questions of constitutional law. In numerous habeas corpus proceedings, the petitioner has prevailed in the federal court on a due process claim which had been expressly presented and rejected in the state court and the decision had become final. Within limitations, the same rule is applicable to civil actions. It has been numerously held that judgments obtained in violation of due process are not entitled to recognition as res judicata.

> "A judgment obtained in violation of due process is not entitled to full faith and credit when sued upon in another jurisdiction. * * * Moreover, due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process." (our emphasis) Griffin v. Griffin, 327 U.S. 220.

As was stated in Hansbury v. Lee, 311 U.S. 32:

> "When the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigants whose rights have thus been adjudicated have been afforded * * * the due process which the Constitution prescribes."

Other cases to the same effect are Postal Telegraph Cable Co. v. Newport, 247 U.S. 464; Hovey v. Elliott, 167 U.S. 409;

Wetmore v. Karrick, 205 U.S.241 and Old Wayne Life Ass'n.v.McDonough, 204 U.S.8.

We particularly direct the court's attention to the case of Bass v. Hoagland, 172 F.2d 205(5th,1949),cert.den.338 U.S.816, 94 L.Ed.494,70 S.Ct.57(1949). A Texas resident was involved in an automobile collision in Kansas and suit was brought against him in the U.S. District Court in Kansas. After filing an answer, the defendant's attorney withdrew and the plaintiff proceeded to take a judgment in the defendant's absence. When suit was brought on the judgment in the U.S. District in Texas, the court refused enforcement (i.e. refused to recognize it as res judicata) and its ruling was upheld:

> "The last defense is more lengthy, and alleges that the judgment is void as taking property without due process of law contrary to the Fifth Amendment * * *; because rendered without a trial by jury after a jury had been duly demanded by plaintiff and defendant had not consented to a withdrawal of the demand under Rule 38(d)."
>
> * * * * * * * * *
>
> "The last defense requires careful consideration. It asserts that the jury trial of the fact issues in the case which is guaranteed by the Seventh Amendment of the Constitution, * * * was denied though demanded; and that default was recited in the judgment as its basis when there was no default, but an answer to the merits; and that if there was default the notice required by Rule of Civil Procedure 55(b)(2) before

proceeding to judgment by default was not given by plaintiff, nor the jury trial had as to the amount of such unliquidated damages as required by the same Rule; and no evidence at all was heard; and that it all amounts to a denial of due process of law under the Fifth Amendment. We believe that a judgment, whether in a civil or criminal case, reached without due process of law is without jurisdiction and void, and attackable collaterally by habeas corpus if for crime or by resistance to its enforcement if a civil judgment for money, because the United States is forbidden by the fundamental law to take either life, liberty or property without due process of law, and its courts are included in this prohibition. * * * The right of jury trial, if not waived but denied after demand, the judge usurping the function of the jury, would seem to be similarly an unconstitutional abuse of power. * * * Rule of Civil Procecure 38 requires that the right be asserted by a demand for it. We have found no federal case which has treated as a mere procedural error a flat denial of a jury trial demanded in a civil case, though we have found none holding its denial to be by itself a good ground of collateral attack.

"* * * There was appearance and pleading as the summons required, and a demand for jury trial by the plaintiff which operated as a demand by the defendant also unless withdrawn by his consent, which was not given. Rule 38 (a,b,d). The judgment nevertheless recites that there was a default

> because counsel for defendant at some previous date withdrew as such. There was no withdrawal of the defendant's appearance and pleading and demand for a jury. * * * This does not look like due process of law under the Constitution, nor even like a judicial trial."

An identical ruling was made in the companion case of Bass v. Bailey (5th,1949) 172 F.2d 212,cert.den.338 U.S.816,94 L.Ed.94, 70 S.Ct.56(1949).

Just as one federal court is required to re-examine the judgment of another federal court to determine if the judgment complies with due process, it is also required to examine the judgment of a state court when called in question during a subsequent federal court proceedings. The leading case of O'Boyle v. Bevil, 259 F.2d 506(5th,1958) also arose in Texas. Two judgments for title to land were obtained by publication in the state court. The state court defendants thereafter filed suit in the United States District Court to vacate the state judgments. The U.S. District Court held the recitals in the state judgments to be conclusive and that the federal courts were bound by them. The holding was reversed on appeal:

> "But for the rule of absolute varity we have found that the record in these two cases discloses that appellants are denied due process if the judgments are allowed to stand in spite of the procedural defects. Is it any less a denial of due process to hold that a court may by its own fiat declare that requirements were met which the record discloses were not in fact met? We think not."

In the case at bar, the State Court held:

> "Our attention is directed to no specific evidence supporting any part of the verdict; nor is it demonstrated how appellants' said constitutional rights were violated. Our examination of the record discloses to us no such evidence and no such violation."(396 S.W.2d 905)

The State Court has declared that it can find no evidence to support "any part of the verdict" and that "the trial court gave appellants every reasonable opportunity to make out a case * * * they failed to do so." Petitioners present that a declaration that the Court can find no violation of constitutional rights does not "render white that which is black nor straight that which is crooked." In line with the O'Boyle case, we submit "that the constitutional requirements of due process require a holding * * * that no such principles of lifting oneself by his own bootstraps can prevent (a federal court) * * * from inquiring into any facts disclosed by the record."(our insertion. In line with Griffin, Hansbury and O'Boyle, we ask that this Court examine the record. In line with Bass, if the record reflects that meaningful jury trial, that is, jury trial in substance as well as in form, was "denied after demand, the judge usurping the function of the jury," then the judgment of the state court is "without jurisdiction and void, and attackable collaterally before this Court in the instant proceedings.

CONSTITUTIONAL QUESTIONS MAY BECOME RES JUDICATA UPON THE BASIS OF ELECTION OR FAILURE TO ASSERT: NEITHER APPLIES TO THIS CASE.

We do not dispute the propositions that where a litigant has chosen the state court as the forum in which he desires to litigate his constitutional question, he may not thereafter assert it in the federal court if dissatisfied with the outcome. Such proposition is not here applicable because there has been no election of forum. In England v. La.State Bd.of Medical Examiners, 375 U.S.411, a group of chiropractors filed a federal court suit attacking the constitutionality of a medical practice act. The federal court invoked the abstention doctrine requiring the plaintiffs to file suit in the state court where it was held that the statute violated neither the state nor the federal constitutions. The Supreme Court held that the state court decision would not be res judicata to the reinstitution of federal court litigation because the plaintiffs had reason to apprehend that they were compelled to present their federal claims to the state courts. In short, there was no election.

Likewise, there has been no election on the part of petitioners, Mr. and Mrs. Sitton, to present federal questions to the state court. At the time they filed their suit, it was simply a tort action between residents of the same state covered entirely by state law. The federal questions arose from the conduct of the trial itself. Under such circumstances, for the federal court to throw up its hands and declare that it has no power to review state court interpretations of the Constitution

would be the abandonment by this Court of its paramount power in the field of federal law.

Now, to a considerable extent, failure to assert is the converse of election. When the federal question arose in the State Court, petitioners were forced to assert it or run the risk of losing it forever on the grounds of failure to assert. The doctrine is well established that constitutional questions must be timely asserted or they will be waived. Not only does this promote respect for the Constitution but it holds out greater promise that the state courts will, in fact, observe due process and provide the relief demanded by the Constitution.

The case of Wagner Electric Co. v. Lyndon, 262 U.S.226 was decided in 1923 and the view of the Seventh Amendment there expressed can hardly be cited as contemporary. Even so, we believe the decision can be justified on the basis of failure to assert. There is no indication that the Seventh Amendment was timely asserted in the state court proceedings. Lyndon v. Wagner Electric Co., 285 Mo.77,225 S.W.711(1920). Failure to assert is also apparent in Rooker v. Fidelity Trust Co., 263 U.S.413 cited by the Court below regarding federal jurisdiction. The case had been previously brought to the Supreme Court, Rooker v. Fidelity Trust Co., 261 U.S.114, where it was held that a federal question not raised in the state court until petition for rehearing is not timely asserted. It would have been entirely inconsistent to hold that the complaint not timely asserted in the state court later be asserted in the federal district court.

We believe that the cases clearly indicate that a due process plea is not

subject to the ordinary rules of res judicata. Absent a failure to assert or an election, a due process claim remains open even though adversely decided in the state courts. It does not constitute "appellate review" for a local federal court to examine a prior proceedings for lack of due process. In addition to the foregoing, there are numerous other cases in point.

In Tribune Review Pub.Co.v.Thomas, 153 F.S.486(W.D.Penna,1957)affd.254 F.2d 883(3rd, 1958), it was held that the plaintiffs could raise their due process points in the federal court even though they had been decided adversely in the state court. In Olson v. Board of Education, 250 F.S.1000(E.D.N.Y., 1966) the plaintiffs elected to place their federal question before the state court but the court chose to rule on state grounds. It was held that the bar of res judicata could not be applied because the state court had not "directly reached the federal constitutional question." In the Texas courts, petitioners' constitutional claims were avoided rather than decided on a pretense that the record discloses "no such evidence and no such violation." The Constitution requires the federal court to determine if, in fact, there was any such evidence or any such violation before applying the rule of res judicata.

THE HIGHER POLICY MUST PREVAIL

Again, res judicata is no more than a declaration of judicial policy. It has numerously been forced to give way to a more commanding policy. In Kalb v. Feurstein, 308 U.S.433, the Supreme Court held that a state court judgment rendered in violation of the bankruptcy act cannot be res judicata.

"The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land." In Denver Bldg. & Const.Trades Council v. N.L.R.B., 186 F.2d 326(Dist.Col,1950)rvsd.oth.gnds.,341 U.S.675, it was held that res judicata could not be applied where it was inconsistent with the statutory scheme of regulation. In Spilker v. Hankin, 188 F.2d 35(Dist.Col,1951) it was held that res judicata would not be applied because of the public policy in giving careful scrutiny to all transactions between attorney and client. In short, the higher policy prevails.

May we point out again that the State Court did not pass on movants' due process points. It pretended that they do not exist. In Wilkins v. Wilkins,(C.A.1896)L.R.P.108 res judicata kept a man, who had been adjudged dead, legally dead, although his death was much exaggerated by the judgment and he was in fact alive. Fortunately, the Court of Appeal had the power to, and did extend the time to move for a new trial thus enabling the court to deal with the facts as they actually were. The precise question here is whether the State Court may prevent consideration of movants' due process points by pretending they do not exist. Res judicata is founded on judicial policy. Due process is founded on constitutional policy. Where the two are in conflict, it can hardly be more apparent that the Constitution must prevail.

RECAPITULATION

A short review of our argument is in order:

(1) The Texas Courts failed and refused

to apply the Seventh Amendment standards forbidding the re-examination of jury verdicts other than according to the rules of the common law and thereby deprived petitioners of due process and equal protection of law.

(2) A judgment obtained in violation of the Fourteenth Amendment may not be enforced in another court.

(3) The federal courts are the final arbiters of due process.

(4) Recitals in a judgment or opinion that there is no evidence to support a verdict are not conclusive. When these recitals are challenged, due process requires that the federal court make its own determination. This, both of the courts below failed and refused to do.

(5) When a party has an election between the state and federal court in which to litigate a federal question, he is bound in res judicata by the election. However, such an election was never available to Mr. and Mrs. Sitton..

(6) Federal policy requires that when a due process question arises in the course of a state court proceedings, a party must present and argue his objections at that time. If he holds it in abeyance for federal court review at a later date, it will be held to have been waived for failure to timely assert and the rule of res judicata will be applied. Petitioners satisfied the rule by timely asserting the federal question before the State Court.

(7) Res judicata is a doctrine of judicial policy and must yield to the "supreme law of the land."

(8) We are unable to find where a state court ruling on a due process question has ever been held to be res judicata unless there has been (a) an election or (b) failure to timely assert. There was neither election nor failure to assert in this case.

(9) The essential holding of Rooker v. Fidelity Trust Co. is that federal jurisdiction is not created by the denial of a constitutional right during the course of state court proceedings. Where federal jurisdiction is invoked on other grounds, the United States Supreme Court has repeatedly held that a lower federal court not only may but must examine the state court record and determine the constitutional issue for itself.

(10) Nor, we submit on a long series of cases from Pennoyer to O'Boyle does it constitute "appellate review" to examine a state court proceeding to determine if due process has been complied with.

DENIAL OF CERTIORARI IS NOT DECISIVE

Ever since their first appearance in the federal court, respondents have spent most of their time arguing that this is a case where the United States Supreme Court "has already denied certiorari." Whether or not they employ the term "res judicata," they contend that denial of certiorari is conclusive. While the opinion of the Fifth Circuit contains no such ruling, the Court did take pains to emphasize that certiorari has been denied. This Honorable Court has repeatedly held that the denial of certiorari is not decisive.

We adopt the opinion in Tribune Review Pub.Co.v.Thomas,153 F.S.486(W.D.Pa.1957) as

our brief and the authorities cited therein as our authorities on the certiorari point. See also U.S.v.Carver, 260 U.S.483,490; Davis v. Balkom,369 U.S.811;Sheppard v.Maxwell,384 U.S.333.

LIMITATIONS IS NOT A BAR

The Courts below did not pass upon respondents' plea of limitations. We urged in the Fifth Circuit that these pleas are not valid under State law (Apts'Br.58-59). The Court's failure to pass upon this point is further reason to grant our motion to refer the case back to the Fifth Circuit.

Nor is the plea of limitations good under federal law. The state courts have been closed to plaintiffs and the federal court had no jurisdiction until the United States became a party. The due process clauses of the Fifth and Fourteenth Amendments precludes limitations from running while the courts are closed or physically unavailable and there is no forum in which the case may be litigated. Hanger v. Abbott, 73 U.S.542;The Protector,76 U.S.687;Ross v. Jones, 89 U.S.576;Osborne v.U.S.,164 F.2d 767(2nd,1956);First Nat'l Bank v.Anglo-Oesterreichische Bank,37 F.2d 564(3rd,1930); Borovitz v. American Hard Rubber Co.,287 F.368(N.D.Ohio,1923).

The Supreme Court has Never Ruled on the Application of the Second Clause of the Seventh Amendment to the States

The Seventh Amendment contains two distinct clauses:

> (1) "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and;"
>
> (2) "No fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Mr. Justice Story declared the two clauses severable in *Parsons v. Bedford*, 28 U.S. 433, 447-448:

> "But the other clause of the amendment is still more important, and we read it as a substantial and independent clause. * * * This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner [than by the] modes known to the common law. * * *"

Petitioners say that Clause Two is the "more important" because it insures that jury trial will be reality rather than promise. The people may feel secure having provided by Constitution and statute for jury trial but, to be effective, the provision must be implemented. For a judge to refuse

to call a jury where the law so provides would be an intolerable act of open defiance but for the same judge to override the jury's decision on the pretense of "no evidence" would be equally subversive of the law and far more insidious because the public is being deluded.

Numerous cases construing the *first clause* of the Seventh Amendment have held that it is not applicable to the states. Most of them are old. However, diligent and exhaustive research fails to turn up a single case where this court has directly and necessarily decided if clause two is applicable to the states. Any argument that the first is decisive of the second has been shown unacceptable. The entire question has been dormant for nearly forty years. It should be reexamined in the light of present-day constitutional principles.

Early Cases Viewing the Relationship Between the Seventh and Fourteenth Amendments

The Supreme Court was slow in answering the mandate of the Fourteenth Amendment. It was early declared that the Bill of Rights was not incorporated into the Fourteenth Amendment. Indeed, some early decisions almost reached the position of denying claims under the Fourteenth Amendment *because* the matter was covered in the Bill of Rights and ergo, *could not* be covered by the Fourteenth Amendment. Such absolutist thinking has been under continuous reexamination ever since.

The Seventh Amendment was treated not a bit differently from the others. The following early cases formed the basis of numerous rulings that the Seventh Amendment had no application to the states. None of them has anything to do with the power of the state judiciary to overturn jury verdicts.

The *Justices v. Murray*, 76 U.S. 274, concerned the federal, not the state judiciary. The Fourteenth Amendment, just

freshly adopted was not discussed. The latter portion of the statement that federal courts may not re-examine jury verdicts *even though the state courts might do so* was clearly dicta. *Edwards v. Elliott*, 88 U.S. 532, did no more than uphold a state statute which eliminated jury trial in certain cases. The petitioner's complaint in *Pearson v. Yewdall*, 95 U.S. 294 is unclear but the verdict was upheld rather than overturned. The case does not involve jury verdict re-examination.

On reflection, the same is true of *Walker v. Sauvinet*, 92 U.S. 90 upholding a Louisiana statute providing that where the jury fails to agree, the court may render a decision on the same evidence. The statute neither permitted verdicts to be overturned nor did it permit judges to substitute their findings for the opinion of the jury. The statute did no more than partially abolish jury trial, a situation having to do only with Clause One of the Seventh Amendment.

To analyze all subsequent cases discussing the relation of the Seventh Amendment to the states would violate all canons of brevity but they are tabulated in the Appendix (A-1 to A-6). None of them contains a direct and necessary holding that the state courts are not required to observe the Seventh Amendment restrictions on the overturning of verdicts.[4]

FELA Cases in the State Courts

The most frequently cited "later" case is the 1916 decision in *Minneapolis & St. L.R. Co. v. Bombolis*, 241 U.S. 211. The only necessary holding of this early FELA decision was that

[4] The cases of *St. L. & K. C. Land Co. v. Kansas City*, 241 U.S. 419, and *Wagner Electric Co. v. Lyndon*, 262 U.S. 226, confuse questions of *res judicata* and collateral attack with the Seventh Amendment. The question in both instances was the finality of a prior judgment and the result would have been the same whether the prior case was decided by judge or jury. See *Empire State-Idaho Mining Co. v. Hanley*, 205 U.S. 225.

majority verdicts do not violate due process. A majority verdict statute does no violence to "the traditions of the people of this nation."[5] However, the Court went on and adamantly declared it to have been "conclusively determined" that *none* of the first ten amendments, are applicable to the states. It was further declared that Congress in enacting the FELA "clearly contemplated" that FELA cases should be tried by state courts "in accordance with the modes of procedure prevailing in such courts." It appears to us that the views expressed regarding both the Bill of Rights and the FELA have been thoroughly rejected.

The FELA received no warmer reception in the courts than did the Fourteenth Amendment. There was "a noticeable tendency in earlier decisions" toward a "narrow intrepretation" of the FELA. 35 Am. Jur., Master and Servant, § 415. The discovery of the act commenced around 1940. In the case of *Brady v. Southern R. Co.*, 320 U.S. 476, this Court, even though denying recovery 5-4, held that while the state courts are not required to provide a jury at all in FELA cases, the jury's verdict must be weighed in accordance with rules of evidence established by federal law *which is precisely the rule for which your petitioners contend.* Other decisions have made it clear that a state court may not substitute its opinion of the facts for the jury's findings:

> "The fact that fair-minded men might reach different conclusions, emphasize[s] the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue * * * as well as issues involving controverted evidence. * * * To withdraw such a question from the jury is to usurp its functions.
>
> "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' * * * Reasonable care and cause and effect are as

[5] Concurring opinion, *United Gas Pub. Serv. Co. v. Texas*, 303 U.S. 123.

elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries." *Bailey v. Central Vt. Ry.*, 319 U.S. 350.

In *Lavender v. Kurn*, 327 U.S. 645, it was held "It is no answer to say that the jury's verdict involved speculation and conjecture. * * * Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." In *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, it was held to be important to grant certiorari "when lower federal *and state courts* persistently deprive litigants of their right to a jury determination" (Emphasis supplied). In the recent cases of *Gallick v. Baltimore & O.R. Co.*, 372 U.S. 108, and *Dennis v. Denver & R.G.W.R. Co.*, 375 U.S. 208, the Court reiterated and re-enforced its position that not only are the observable physical facts for the jury, but that the inferences and deductions leading to the conclusion of liability are jury questions as well.

The foregoing cases all came up from state courts. This is the standard which the states must follow in trying FELA cases. FELA cases are statutory, but nothing on the face of the statute provides for a more liberal standard of jury trial than in other cases. We suggest that it is the re-examination clause of the Seventh Amendment and not the language of the statute which requires jury verdicts to be honored if any evidence can be found to support them. Such is the position taken by the concurring opinion in *Harris v. Penna. R. Co.*, 361 U.S. 15: "Jury trial—guaranteed by the *Seventh Amendment*" is "part and parcel of the remedy under this Federal Act *when suit is brought in state courts*" (Our emphasis).

The Standard for Weighing the Verdict in Other Cases

In *Dick v. New York Life Ins. Co.*, 359 U.S. 437, this Court relied on FELA decisions and held that it was the function of the jury, not the court to choose among conflicting in-

ferences. Again citing FELA cases in *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, this Court indicated that the same standards must be applied for weighing a jury verdict in all cases. The Court said that "neither we nor the Court of Appeals can redetermine facts found by the jury," that trial by jury is part of the remedy and "It is the Seventh Amendment that fashions 'the federal policy favoring jury decisions of disputed fact questions.'"

The rule has been repeatedly stated and applied. In an 1891 suit on a life policy containing a "non-drinking" clause, it was held:

> "It may be that if we were to usurp the functions of the jury and determine the weight to be given to the evidence, we might arrive at a different conclusion. * * * We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted." *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 91.

Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690 was a conspiracy action just as the case at bar. It was held that before taking the case from the jury, the evidence had to be viewed in the light most favorable to the opposing party and that it must receive "the benefit of all inferences which the evidence fairly supports." Further, "'(T)he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.'"

The case of *Phillips Pet. Co. v. Gibson*, 232 F. 2d 13 (5th, 1956) arose in Texas just as the case at bar. A welder working on an oil well drilling rig won a verdict for injuries sustained in an explosion. The Court of Appeals reversed concluding that the plaintiff failed to take any precautions for his own safety and was therefore barred from recovery. This Court reversed summarily thereby re-asserting that the failure of the plaintiff to observe the prudent man rule is as much a question of fact for jury determination as the

defendant's failure to do so. *Gibson v. Phillips Pet. Co.*, 352 U.S. 874. Petitioners Sitton have also been deprived of a jury verdict upon a court-made determination of failure to observe prudent man standards.

> "What is the significance of the Supreme Court's decision? Clearly it will not attempt to supervise the lower federal courts in all their applications of local law in diversity cases. * * * The conclusion is that the Supreme Court was not willing to go along with the Texas court in the determination of this issue as a matter of law by virtue of the local doctrine.
>
> "No doubt the controlling matter here is the attitude of the Supreme Court towards the protection of jury trial under the 7th amendment. The doctrine of the Texas court is a transparent device to syphon off the power of the jury by converting a question of fact into a question of law.
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> * * * * *
>
> "In Texas, especially, by virtue of its complex proximate cause and negligence *per se* doctrines buttressed by intricate and numerous special issues, jury trial has been greatly impaired. * * * The *Gibson* case may well open a broad attack on those doctrines where federal courts are constrained to follow what is apparently local substantive law but in fact only devices for restricting jury trial." Green, Protection of Jury Trial in Diversity Cases, 35 Tex. L. Rev. 768 (1957)

In *Mercer v. Theriot*, 377 U.S. 152, the plaintiff's decedent was killed by a hit and run driver. The plaintiff relied on circumstantial evidence alone. It was shown that the defendant had been drinking heavily immediately beforehand, that he passed by the scene of the accident close to the time of death, that the decedent was obviously struck by a car, that recent damage was found on the defendant's car and that a towel with blood-like stains was found beneath the seat by investigating officers. "The evidence was sufficient under any standard which might be appropriate—state or

federal. * * * The jury's verdict, therefore, should not have been disturbed." We suggest that when a deed is admittedly altered after its execution at a title company office at the request of the grantee, the jury is not obligated to believe that an innocent mistake occurred and that the evidence of conspiracy is here sufficient "under any standard which might be appropriate" even without the testimony of the V.A. agent that "Moorman told me he had her do it and she told me she did it" (A- 25)

Other cases holding that the courts may not substitute their opinion of the facts for the findings of the jury are *Williams v. Carolina Life Ins. Co.*, 348 U.S. 802 (Accidental death claim, jury found the fatal heart attack was caused by deceased's falling from horse; Court of Appeals, 210 F. 2d 477, found other theories of death to be equally consistent and declared verdict based on "speculation". Verdict reinstated by Supreme Court.); and *Union Trust Co. v. Eastern Air Lines*, 350 U.S. 907 (Airplane crash; Court of Appeals, 221 F. 2d 62, 70-73, ordered new trial because testimony that plane attempted landing without permission so weak as to have "no probative force". Verdict reinstated by Supreme Court.)

All FELA cases cited came up from the state courts. The remaining cases were tried in the federal courts and principally involve diversity jurisdiction. The conclusion cannot be escaped that the Supreme Court of the United States considers that under Clause Two of Amendment Seven the role of the jury as the finder of fact is paramount. On these authorities, we submit:

(1) The Seventh Amendment clause against re-examination applies in full vigor to the state courts when they are hearing federal matters.

(2) The Seventh Amendment clause against re-examination applies with equal vigor to the federal courts when they are hearing non-federal matters.

(3) The only question remaining open is the one we present here today: Does the Seventh Amendment clause against re-examination apply to the state courts when they are trying non-federal matters? We say there should be no distinction.

The only conceivable reason for refusing to apply a uniform rule would have to lie in the policy of allowing wide latitude to the citizenry of a state in shaping their laws and institutions. But what theoretical basis is there for allowing more latitude in the one instance than in the other? We are dealing in every instance with the rights of the citizens of the United States. We submit that the latitude lies *with the people* and not with the judges of the state courts as individuals. When state judges call a jury in obedience to the mandate of their electorate and proceed to substitute their opinion of the facts for the opinion of the jury, they are perverting both state and national interests. It hardly appears that they are serving a sufficiently valid objective to warrant withholding from the citizens of the United States the full benefit of Clause Two of the Seventh Amendment to the United States Constitution.[6]

The Fundamental Nature of the Amendments

There has long been a minority view that the Fourteenth Amendment made the entire Bill of Rights applicable to the states. While this view has not prevailed, the Court has con-

[6] The *Bombolis* decision views with alarm the prospect that "hybridization" might occur and the procedure in "both state and Federal courts would from day to day depend * * * [upon] the mere subject-matter of the controversy." With respect to federal diversity cases, the "hybridization" issue has been resolved by declaring that Clause One of the Seventh Amendment requires trial by jury even though state law may provide otherwise. *Simler v. Conner*, 372 U.S. 221.

Petitioners ask that the "hybridization" issue be resolved with respect to the state courts by declaring that Clause Two prevents the court from substituting its opinion for the findings of the jury regardless of the subject matter of the case.

tinued the process of selectively holding that various guaranties expressed in the first eight Amendments apply to state action. Even before the *Bombolis* decision, the adamant position there taken that the Fourteenth Amendment had no connection with the Bill of Rights had already been pierced in the case of *Chicago R. & Q.R. Co. v. Chicago*, 166 U.S. 226, where the Court without noticing that the same restriction was incorporated in the Fifth Amendment held that the Fourteenth Amendment prohibited the taking of property for public use without compensation.

In *Abington School Dist. v. Schempp*, 374 U.S. 203, 215-216, a long series of cases was cited leading up to the proposition that all phases of the First Amendment were included in "'the fundamental concept of liberty embodied in that (Fourteenth) Amendment.'"

It was frequently stated in the early cases that the Sixth Amendment does not prevent the states from abolishing jury trial in criminal cases. Some of the cases went even further and inferred that inasmuch as no jury trial was required of the states by the Sixth Amendment, it was not necessary for a fair and impartial jury to be furnished. Such untenable inferences have been completely rejected by a series of cases leading to the conclusion that wherever the state provides for the accused to be tried by jury, the Fourteenth Amendment requires that not only the trial but the arrest and all proceedings leading up to the trial fully comply with the Fourth, Fifth, and Sixth Amendments.

The prohibition against unreasonable searches and seizures was applied to the states in *Mapp v. Ohio*, 367 U.S. 643. It was held that the prohibition would be no more than "a form of words" unless enforced against the states in the same manner as enforced against the Federal government; that is, by completely excluding the contaminated evidence. *Id.* 655. Your petitioners would submit that jury trial is equally sub-

ject to being reduced to "a form of words" unless the re-examination clause is enforced against both state and Federal courts in the same manner.

> "The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." *Malloy v. Hogan*, 378 U.S. 1.

As matters now stand, the Supreme Court has decided that at least part of each of the first eight Amendments is sufficiently fundamental that the states are obliged under the Fourteenth Amendment to observe them—that is, all but the Seventh Amendment. This Court has not issued a decision directly concerning the application of the Seventh Amendment in the state courts for many years. It has never directly and necessarily ruled upon the application of the clause prohibiting the re-examination of jury verdicts.

Is Clause Two of the Seventh Amendment Fundamental?

Petitioners do not attack the first clause of the Seventh Amendment, they were provided with the form of jury trial but not the substance. Undoubtedly, it was concern that jury trial might be reduced to an empty formality which led the Framers of the Constitution to include a second clause in the Seventh Amendment and which led Mr. Justice Story into describing the Clause Two as "still more important" and "a substantial and independent clause."

A parallel situation was before this Court in *Smith v. Texas*, 311 U.S. 128 (Exclusion of minorities from grand jury service). May we paraphrase:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For [the Court to substitute its opinion of the facts for

the findings of the jury] not only violates our Constitution * * * but is at war with our basic concepts of a democratic society and a representative government. * * * The fact that the written words of a states' laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not merely promised.

"Here, the Texas [Constitution and laws (A-65) hold out great promise.] But by reason of the wide discretion [inherent in the judicial process], it is equally capable of being applied in such a manner as practically to proscribe [any result which the individual judges might personally feel] to be undesirable. And from the record before us the conclusion is inescapable that it is the latter application that has prevailed in [Dallas] County." (Insertions ours)

As far as the "fundamentalness" of the civil jury is concerned, the fact that the citizenry of virtually every state has seen fit to insert a civil jury provision in its constitution speaks out more firmly for the right than all the texts and opinion.[1]

"The trial by jury is justly dear to the American people. * * * Every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every State constitution in the Union." *Parsons v. Bedford*, 28 U.S. 433.

Legal writers from the time of Blackstone have advocated jury trial in the strongest terms:

"The trial by jury is looked upon as the glory of the English law, * * * an advantage in regulating the civil property, * * * the most transcendant privilege, which

[1] For an analysis of state constitutional provisions for jury trial, see the appendix to Mr. Justice Frankfurter's article, Memorandum on "Incorporation" of the Bill of Rights, 78 Harvard L. Rev. 747, 768-783 (1965).

any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals. * * * Because Rome, Sparta and Carthage have lost their liberties, therefore those of England in time must perish. But it must be recollected, that those states, at the time when their liberties were lost, were strangers to the trial by jury." Blackstone's Commentaries, Gavit Ed. (1941) 689-90.

He struck at the entire *raison d'etre* of jury trial as follows:

"If [the impartial administration of justice] be entirely entrusted to the magistracy, a select body of men, usually chosen * * * by parties holding the highest offices in the state, their decisions will frequently have an involuntary bias toward those of their own rank and dignity; for it is not to be expected, that the few should be always attentive to the interests and good of the many.

* * * * *

"This, therefore, preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens." Id., 690.

Blackstone's reasoning is as timely as tomorrow's newspaper. The judiciary as a class is poorly qualified to represent either the common man or the conscience of the community. The problem compounds as our nation matures, as the concentration of economic power and social prestige increases and as wealth is more frequently transmitted to the third and fourth generation. The centers of economic power and influence always hire the most skilled and experienced lawyers, drawing heavily from their own class. In a period of time, when those lawyers aspire to the judiciary, the same centers of economic power and influence will sponsor them both in reward for favors past and in anticipation of favors future. The ordinary plaintiff is lucky to find a lawyer, any

lawyer willing to undertake the risk that he will go uncompensated if the case fails. The client may think that there is only one adversary in the courtroom although his lawyer will often recognize that there are two, the defense lawyer and the defense-minded judge.

No law that we have ever heard of *requires* that the parties submit their case to a jury. The only reason that a jury is ever called in any case is that one or both parties is dissatisfied with the prospect of leaving the decision of the facts to the judge. To call a jury in many instances is to do no more than equalize an unbalanced situation. The entire theory of our democratic society is one of checks and balances; power and control are to be distributed and counterbalanced to the greatest extent possible. The tendency of the judiciary to override jury verdicts, to substitute their opinion of the facts, is the tendency to destroy an essential element of our system of checks and balances.

> "A system of laws—however just—that exists only in theory is a slim basis for a claim to moral leadership. * * * We must not forget that the role of the courts is not merely to define the right; it is also to administer the remedy. Unless the remedy is actually applied to persons and things, the right is merely a pious idea." Foreword by the Hon. Earl Warren, Civil Justice and the Jury, Prentice-Hall, 1962.

> "A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob v. New York City*, 315 U.S. 752.

> "The Fifth, Sixth, *Seventh* and Eighth Amendments were directly and purposefully designed to confine the power of courts and judges. * * *

* Nor is the privilege to call a jury one-sided. It is equally available to a defendant who feels uneasy before a judge who made his career and reputation as a personal injury lawyer and who still enjoys addressing labor rallies.

> "As manifested by the Declaration of Independence, the denial of trial by jury and its subversion by various contrivances was one of the principal complaints against the English Crown. Trial by a jury of laymen and no less was regarded as the birthright of free men." *Green v. United States*, 356 U.S. 165, 208-209, (Dissenting opinion) (Emphasis supplied).

The Seventh Amendment has long since been held to be so fundamental that it must be followed in the territorial courts.[9] Conflicting statutes of Congress and the territories are not constitutional.

The second clause of the Seventh Amendment has long been considered as fundamental to the operation of the federal courts; so fundamental that it must be applied even in cases removed or otherwise brought up from the state courts.[10]

This Honorable Court acting under the Seventh Amendment has repeatedly declared that trial by jury should be enlarged, not restricted. It has discarded the old rule that when a case goes to the equity docket, the parties lose the right to a jury on claims at law.[11] Wherever possible, the legal issues are to be decided first and before a jury. When a common law claim and an admiralty claim are joined, the entirety is to be tried to a jury. *Fitzgerald v. United States Lines*, 374 U.S. 16. And, concerning the court martial of civilians abroad, the Court has reversed itself and declared that such may not be done. *Reid v. Covert*, 354 U.S. 1.

In *Simler v. Conner*, 372 U.S. 221, it was held that a Federal court must provide this fundamental right in a diversity case even though the state law provided to the contrary. "The federal policy favoring jury trials is of historic and continu-

[9] *Kennon v. Gilmer*, 131 U.S. 22; *Springville v. Thomas*, 166 U.S. 707; *Thompson v. Utah*, 170 U.S. 343; *Dill v. Ebey*, 229 U.S. 199.

[10] *Parsons v. Bedford*, 28 U.S. 433; *The Justices v. Murray*, 76 U.S. 274; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226.

[11] *Beacon Theatres v. Westover*, 359 U.S. 500; *Dairy Queen v. Wood*, 369 U.S. 469.

ing strength." Similarly, in diversity actions where the state's practice considers certain matters to be questions of law for the court, Federal courts must nevertheless submit them to a jury if they are, in essence, questions of fact. *Byrd v. Blue Ridge Cooperative*, 356 U.S. 525; *Magenau v. Aetna Freight Lines*, 360 U.S. 273.

And, may we again point out that even though it has been held that a state is not required to afford a jury in FELA cases, this Court considers the "re-examination" clause sufficiently fundamental that it governs state court litigation under the FELA. It is the Seventh Amendment, not the statute that requires that jury verdicts be diligently upheld *Harris v. Penna. R. Co.*, 361 U.S. 15 (Concurring Opinion).

Civil Jury trial stands on the same basis as criminal jury trial in our national Constitution and in practically all state constitutions. The Court has never reconsidered its early premise that the Fourteenth Amendment does not prevent the states from abolishing criminal juries. Nevertheless, a long line of decisions has progressively told the states that when an accused is brought before a jury, all the safeguards to a fair trial that are contained in the Bill of Rights must be employed. All that your petitioners ask is that similar safeguards be employed with respect to civil jury trial.

One thing cannot be more clear. Clause Two of the Seventh Amendment is fundamental to the vitality of the first, for it is the safeguard which converts promise into reality, prevents the delusion of the public, and raises the first to something more than a "pious idea." We question the decisions holding that the states may deny a civil jury but we do not attack them. We do ask this Court to look at civil jury trial and firmly declare:

"Abolish it if you will but usurp it never!!"

JURY TRIAL IS OF HISTORIC AND CONTINUING STRENGTH

"Court Expands Right to Jury Trial" was the headline on May 21, 1968 when Duncan v. Louisiana, 391 U.S.145 and Bloom v. Illinois, 391 U.S.194, were decided. For a

change, a criminal law decision of the Supreme Court met with widespread approbation. Over the years, a fistful of dicta and loose statements had accumulated to establish the principle that the Fourteenth Amendment does not require trial by jury in criminal cases. All precedent was by necessity dicta because no state had ever abolished jury trial with respect to major crime. Jury trial is too sacrosanct for that. All such loose precedents were overthrown "because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice."

Petitioners do not ask that the right to call a jury in a civil case be expanded. That right, equally sacrosanct, has already been thoroughly and widely established. They do ask that the right to recover on a jury verdict be protected by the Fourteenth Amendment to insure that this "fundamental to the American scheme of justice" may be protected.

Even more recent is the case of Grunenthal v. Long Island R.R.Co., 393 U.S. 156, where the Court gave indications that remittiturs in the Federal Court do not violate the Seventh Amendment, but held the remittitur in that case unjustified. Remittitur is not involved in the Sitton's case. The right to order new trials either directly or on condition of remittitur always has been and should be broader than the right to utterly destroy a jury award as done here.

ARBITRARY AND DISCRIMINATORY CONDUCT IS DIRECTLY VIOLATIVE OF THE FOURTEENTH AMENDMENT

Notice carefully that the Texas Constitution contains a provision similar to the Seventh Amendment and the Texas Rules provide that a special verdict shall "be conclusive as to the facts found." Ordinarily the decisions of state courts as to state law are final but there is a clear exception. An arbitrary or discriminatory interpretation of state law violates the due process and equal protection guaranties of the Fourteenth Amendment.

Obviously, the Fourteenth Amendment does not guarantee an error free trial; otherwise, every case would be a due process case. East Crossroads Center, Inc. v. Melon Stuart Co., 245 F.S.191(W.D.Pa.1965). The real question under this point, and a question which the Courts below declined to entertain was: "Was the Texas Court judgment fundamentally unfair?". We renew our motion to refer the case back to the Fifth Circuit so that the Court will examine the record as it did in O'Boyle and expressly answer this question. Alternatively, we ask the Supreme Court to examine the record.

Petitioners produced an unimpeachable and unbiased witness to testify that two of the defendants admitted everything. We cannot conceive how a stronger case for recovery could be presented. The holding of "no evidence" fails to meet any standard for testing the evidence, state or federal. Mercer v. Theriot, 377 U.S.152. "Because a State may dispense with a jury trial, it does not follow that it may substitute trial

by ordeal." Brown v. Mississippi, 297 U.S. 278.

Because of the space limitations, we cite our authorities with only the briefest discussion: Due process and equal protection require a court to follow the settled course of legal proceedings, Pennoyer v. Neff, 95 U.S. 714, which was not done in this case. Lloyd v. Brinck, 35 Tex. 6 (1871); Leyva v. Pacheco, 163 Tex. 638, 358 S.W.2d 547 (1962); West v. Slaughter, 384 S.W.2d 185 (Tex. Civ. App. 1964).

A finding of "no evidence" is a fact finding in and of itself; it cannot be otherwise. A judgment that is based on "no evidence" violates the guaranties of the Fourteenth Amendment. Creswill v. Grand Lodge, 225 U.S. 4; Fiske v. Kansas, 274 U.S. 380. When a court ignores testimony that "Moorman told me he had her do it and she told me she did it" (A-10), and disregards the fact that competent conveyancers simply do not mutilate instruments in the manner shown by this record, then it is the Court's finding of "no evidence" not the jury verdict which is "so totally devoid of evidentiary support as to render * * *(the holding) unconstitutional under the Due Process Clause of the Fourteenth Amendment." Thompson v. Louisville, 362 U.S. 199.

A court must follow the established rules of law, Kilbourn v. Thompson, 103 U.S. 168, 182. A jury verdict is a vested right, a qualified form of property and property may not be deprived [12] except

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12. Chicago B.&Q.R.Co. v. Chicago, 166 U.S. 226 (Condemnation proceedings); Raymond v. Chicago Union Traction Co., 207 U.S. 20 (Discriminatory taxation); Panhandle Eastern Pipe Line Co. v. State Highway Comm., 294 U.S. 613 (Highway Commission may not require relocation of pipe lines at owner's expense.)

according to the settled course of judicial proceedings uniformly applied. McCullough v. Virginia, 172 U.S.102. Discriminatory reversal of position by an appellate court violates the Fourteenth Amendment; such is the instant case. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S.673.

"Even a dog distinguishes between being stumbled over and being kicked." Holmes, The Common Law, Little Brown & Co., 1938, p.3. The rulings of the state court reflect a conscious indifference to the established law and procedure, a chosen and predetermined effort not to apply the law and not to correctly construe the facts. Which is the more violative of due process, to render judgment where there is no evidence, or to usurp the jury verdict where there is plain evidence? Schware v. Board of Bar Examiners, 353 U.S.232; Thompson v. Louisville, supra. We see no distinction.

We urge that the Court answer the question: "Was the state court judgment of 'no evidence' fundamentally unfair?" The State Court declared that it can find "no specific evidence supporting any part of the verdict"(A-60). In that Court, we devoted the greater part of a 93 page brief to an analysis of the evidence. That brief was Exhibit A-1 in the U.S. District Court and is a part of this record. We submit that such declarations are palpably untenable.

We also invite this Court to carefully examine the opinion of the State Court. Did Blackstone have this type of decision in mind 200 years ago when he spoke of "boldly asserting that to be proved which is not so, or by more artfully suppressing

some circumstances, stretching and warping others, and distinguishing away the remainder." Blackstone's Commentaries, supra,690. If this Court agrees, it cannot but hold that such a conscious and willed departure from the established rules of law relegating questions of fact to the jury constitutes a violation of the Fourteenth Amendment.

STATE LAW

We do not find where the Texas Court of Civil Appeals ruled on any propositions of law. Including the statement that the Court finds "no such evidence" that petitioners' "constitutional rights were violated", we find thirteen separate rulings of "no evidence" or the equivalent thereof in the opinion below. In closing, the Court magnanimously declared that petitioners had been given "every reasonable opportunity to make out a case" and "they failed to do so." If there are any principles of state law which prevent recovery for this type of forgery, the Court could have succinctly stated them and would have been spared the necessity of buffetting the evidence so extensively. The fact that the Court cited no authority beginning to approach the facts of this case further shows that the Court concerned itself with evidence, not with law.

At the same time, statements such as the one that the Court can find no evidence that any respondent conspired to do any act which nullified "any enforceable agreement", injects doubt as to just what was the basis of the decision. In their motion for rehearing, petitioners requested several findings of fact, distinctly separated from findings of law (Apts.M/Rehg,etc.Ct.Civ.App., A-1-7). Even though the rules providing

for the return of findings of fact speak in mandatory terms,[16] petitioners' request was overruled. Petitioners submit that if the Court presented any rulings on the law, they are without substance. A Court cannot avoid constitutional questions by making untenable rulings upon state law. Stern & Gressman, Supreme Ct.Prac.(4th Ed.) 138-142. If the Court is in doubt whether any point of state is involved, our motion to refer the case back to the Fifth Circuit should be granted.

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16. Rules 453-455, Tex.Rules Civ.Proc.

Texas follows the general law concerning conspiracy. The definition given by the Court (A-55) or an approximation thereof is widely accepted. Analysis of the cases shows that the tort has two well-defined elements: (1) joint endeavor and (2) individually tortious conduct. Neither intrigue nor immorality nor grossly unfair conduct make a conspiracy. With certain distinctions not here material, there must be conduct which would have been actionable if carried out individually. However, the conduct shown by this record was forgery, no less.

With respect to joint endeavor, the evidence shows that respondents solicited the trust and confidence of petitioners, that they represented that "Moorman would assume the debt" (A-53), that the forgery was performed "in the office of the title company" (A-53), that Moorman scouted up the spurious grantee (A-53), that Summer was the only one who could bring pressure to bear on the title company (A- 34, 35&38), that he stood to lose a substantial commission when Moorman refused to conclude the transaction on the basis of an "assumption" deed (P's. Ex. 7, Exhibit Vol.), that all three told Mrs. Sitton the same false story about an "open" deed (A-38 &39); and that respondents Brown and Moorman admitted everything to the V.A. representative (A-22 to 25). How can anyone maintain a straight face and declare that the record is devoid of evidence that the alteration was a product of the joint endeavor of "two or more persons" (A-55).[17]

The Court's opinion infers but fails to hold that there must not only be proof of tortious overt acts and participation therein, but that the plaintiff must further prove a nebulous element entitled "concerted action." There is no

[17] Again, the liability of Summer is of secondary concern at this moment. Where several are charged with conspiracy, judgment may go for some and against others. *St. Louis & S.W.R.Co. v. Thompson*, 102 Tex. 89,113 S.W. 144 (1908) (Cited in opinion, A-42); *Underwood v. Winkel*, 249 S.W. 1111 (Tex. Civ. App. 1923).

such authority. Neither the Court's authorities nor the thirty case shotgun barrage laid down by respondents so holds.

However, our point is that, if any such mystical element is contained in the tort, it is a jury issue. It is a subjective finding just as the concepts negligence, proximate cause, foreseeability, malice aforethought, scienter, etc. The fact that such are wholly subjective and can never be proved or disproved to a certainty does not make them any-the-less *jury issues*. The jury was charged (Issue 2, A-41) on "concerted action" practically *ipsissimis verbis* with the opinion (A-55) and it returned in favor of petitioners. This, we present, is yet another instance of the substitution of the Court's opinion for the findings of the jury.

> "The Deputy Commissioner treated the question * * * as a question of 'fact.' Doing so only serves to illustrate once more the variety of ascertainments covered by the blanket term 'fact.' Here of course it does not connote a simple, external, physical event * * * Yet the standards are not * * * of such a nature as to be peculiarly appropriate for independent judicial ascertainment as 'questions of law.'" *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504.

Conspiracy, like negligence is a concept of tort law which "cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre," *Schulz v. Penna. R. Co.*, 350 U.S. 523, 525. It calls, therefore, "for the exercise of common sense and sound judgment under the circumstances of particular cases;" a fact issue for the jury. *Ibid.*

The Court speaks of nullifying an "enforceable" agreement and points out that the initial sales contract prepared by real estate agent Summer was silent concerning the assumption by Moorman of petitioners' G.I. loan. Petitioners say that respondent Summer in dealing with these people

of limited education deliberately omitted any such provision from the sales contract (A-37 & 38) while verbally assuring petitioners that Moorman would do so (A-53) and that he later prevailed on title agent Brown to make the alteration. Inasmuch as the initial agreement was silent regarding assumption, this was a matter to be covered by other agreements or negotiations. Any question was concluded by the terms of petitioners' G.I. deed and all other agreements and negotiations were merged therein. *Sunderman v. Roberts*, 213 S.W. 2d 705 (Tex. Civ. App. 1948) The Court itself overruled American's cross point urging that the contract controlled over the deed[18] (A-61).

In a single paragraph the Court declared there is no evidence that Moorman agreed to pay or that he accepted a deed obligating him to pay or would have accepted such a deed or that respondent Brown was his agent or that he ratified her conduct or that he knew of the assumption provision or that the instrument was ever delivered or that he ever accepted it. The Court further states that the instrument was altered before it was "delivered to any one" (A-56).

Most of these rulings fly straight in the face of the evidence, particularly the testimony of the V.A. agent; still another instance of Court-made findings in a jury case. We think that the law of agency, ratification, contracts, conveyances, etc., has no application and that the entire paragraph is wiped out by the final statement that this suit is "strictly one in tort." Call it forgery by joint endeavor or call it conspiracy, the elements are identical. The ruling is a virtual license to commit fraud to brokers and conveyancers. We ask: If Moorman had altered the instrument with his own hand while chanting "I do not accept, I will not pay, I do not ratify, I refuse to be obligated and I am

[18] Cross-Point 1. "The rights of the Appellants herein were no greater than those spelled out in the contract of sale and such contract of sale did not require any one to assume existing indebtedness on the Andover house." (Brief for American, et al. 49-50)

not taking delivery of this instrument," would his conduct or his declarations control? We further ask: Is the situation one whit different when he secures another to perform his forgery for him?

Nor is the testimony of McMaster, either in its entirety or the snatch thereof which the Court describes as "all we find," to be dismissed out of hand as "clearly hearsay" (A-55 &56). The Court itself overruled Duckworth's Cross point attacking the McMaster testimony as hearsay[19] (A-61). The declarations by Moorman are *clearly admissible* against Moorman and the statements by Brown are *clearly admissible* against Brown. Taken together, they prove the conspiracy. The law could hardly be otherwise.[20] Johnson v. Lagow, 14 S.W.2d 818(Tex.Comm.App.1929); International Bankers Life Ins.Co.v.Holloway, 368 S.W.2d 567(Tex.1963)

The respondents filed a total of thirty cross-points, eight of which were sustained (A-61 to 63. Cross-points have the same function in Texas practice as a conditional motion for new trial in federal practice. They are filed as the basis for obtaining a new trial in case the judgment *n.o.v.* be reversed.[21] We do not think the matters therein contained are substantial but the proper disposition of these cross-points will not arise until this honorable Court elects to reverse.

Mental and Physical Suffering

Petitioners' right to recover for emotional upset and physical suffering pursuant to the numerous letters and collection contacts, the loss of credit and the impairment of Mr. Sit-

[19] Cross-Point 1. "The court erred in allowing the testimony of the witness Daniel H. McMaster over the timely objection of counsel that it was both hearsay and immaterial to any question properly before the court." (Duckworth Brief 31-32)

[20] The overruler without discussion of petitioners' point three (A-48) concerning the Statute of Frauds is clearly insubstantial. When an instrument is destroyed, the statute is satisfied by proving its former existence. *Patrick v. Badger*, 41 S.W. 538 (Tex. Civ. App. 1897) Such would be particularly true where the obligor caused the destruction in an effort to evade the obligation.

[21] Rule 324, Tex. Rules Civ. Proc.

tons veteran's benefits is not dispositive because he also seeks to recover the mortgage deficiency assessed against him by the U.S. District Court.[22]

This is not a "harrassment" case. The loan company demanded payment by letter and by phone but it had a right to do so. The V.A. did likewise. Demands by "The Federal Government" are apt to be quite upsetting to people of limited education but demands for payment by public or private agencies have a social utility and are privileged as long as they remain within wide bounds of reasonableness. In the case at bar, the gist of the tort is reckless and wilful interference with a valuable relationship. The intermeddler is liable for causing damages even though the ultimate actor is privileged. The best example is those cases where wilful intermeddlers cause employees at will to be discharged from their jobs. *Cotton v. Cooper*, 209 S.W. 135 (Tex. Comm. App. 1919); *Harris v. Trader's & General Ins. Co.*, 82 S.W. 2d (Tex. Civ. App. 1935).[23]

[22] The seriousness of the recurrence of Mr. Sitton's speech impediment cannot be captured on a written record but the jury received demonstrative evidence thereof. A medical witness described him as "very labile" and expressed concern that the events had "stirred up an emotional well". (Testimony 360-361) His employer corroborated his emotional upset and the decline in his work. (Testimony 353-356) After seeing him and hearing the evidence, the jury awarded him $30,000

Mrs. Sitton testified to continued upset over an extended period of time, compounded by worry over her husband's declining health. Her difficulties are not restricted to her fall from an automobile; they merely include this unfortunate fall. There is no doubt she fell, the only question is causation. The defendants objected that her fall had "no causal connection," the trial court ruled "It goes more to the weight than to the admissibility * * * I will allow the evidence to be considered" (Testimony 301-302). It thereafter asked the jury to fix her damages as a whole and the jury found her entire damages at $10,000

[23] Note also that in *St. Louis & S.W.R. Co. v. Thompson*, 102 Tex. 89, 113 S.W. 144 (1908), cited in the opinion, that a third party, the international union, innocently made the publication complained of and that the suit was against those wilfully *causing* the publication.

The law has long allowed compensation for emotional upset and attendant physical suffering in cases of wilful injury such as assault without physical battery, false imprisonment and more recently, invasion of privacy. While views are widely divergent, the present-day trend is to allow damages for emotionally induced injuries even in negligence cases. *Falzone v. Busch*, 45 N.J. 559, 214 A. 2d 12 (1965); *Battalla v. New York*, 10 N.Y. 2d 237, 176 N.E. 2d 729 (1961) *As far as Texas law is concerned, the Court reviewed *the very cases upon which petitioners rely* and declared that recoverability is "now well settled" [24] Nevertheless, it ruled that the plaintiffs could not recover because, *in the Court's opinion*, the petitioners failed to act as the ordinary and prudent man would act under the same or similar circumstances. Such ruling raises two federal questions: [25]

1) It appears to us that the alleged failure to apply to the V.A. for relief is more properly classifiable as failure to mitigate (which reduces damages *pro tanto*) rather than contributory negligence (which bars recovery). However, the label is unimportant. Whether we speak in terms of failure to mitigate or contributory negligence or assumption of risk or voluntary exposure to known hazards or various other labels, it is completely obvious when we look beneath the verbiage that the Court is ruling that the plaintiff violated the prudent man rule. We suggest that the plaintiffs' conduct is just as much a jury issue as the defendants' conduct and that the Court has indulged in "a transparent device to syphon off the power of the jury." Green, Protection of

[24] In addition, see *St. Louis & S.W.R. Co. v. Alexander*, 106 Tex. 518, 172 S.W. 709 (1915); *Houston Elec. Co. v. Dorsett*, 145 Tex. 95, 194 S.W. 2d 546 (1946) and *Stafford v. Steward*, 295 S.W. 2d 665 (Tex. Civ. App. 1956).

[25] The Court's ruling further violates local practice. Respondents waived the right to have the jury consider the plaintiffs' conduct by failing to present any pleadings or request any charge on the matter.

* See also Crisci v. Security Ins.Co.426 P.2d 173 (1967)

Jury Trial in Diversity Cases, 35 Tex. L.Rev.768 (1957); Dice v. Akron,C.&Y.R. Co.,342 U.S.359; Hodges v. Easton,106 U.S.408.

2) We further submit that the purpose and effect of the veteran's relief statute, 38 U.S.C., s 1820(a)(4), quoted and discussed in the Court's opinion is strictly a matter of federal law. This statute was enacted solely for the protection of veterans. A veteran has no duty to invoke the statute for the benefit of a grantee who may contractually assume his loan; certainly there is no obligation to forgers and intermeddlers. "Absent duty; there can be no actionable negligence." Central Stikstof v. Pennsacola, 316 F.2d 189(5th, 1963). Any other construction strips the veteran of protection afforded to him by Congress and thrusts private obligations off into the federal treasury. Rather than beg for charity, Mr. Sitton attempted to make payments (Pleadings 25, Testimony 350-351). He had the absolute and unqualified right to so elect without forfeiting any rights against third parties.

CERTIORARI IS NECESSARY TO PROTECT THE INTEGRITY OF TRIAL BY JURY

Special and important reasons for certiorari exist here because the State Court has directly refused to be bound by Clause Two of the Seventh Amendment and the Federal Courts have done likewise by bottoming their judgment to the State Court's judgment steadfastly declining to examine that State Court judgment for any constitutional defects. The holding of no federal jurisdiction in a case where the United States is a party is an unwarranted and a troublesome extension of Rooker v. Fidelity Trust Co. The

Rooker doctrine has not been re-examined for many years. The application in the state courts of the clause prohibiting the re-examination of verdicts is a matter which has never been decided head-on.

In recent years, there have been numerous scathing attacks upon the Supreme Court of our land for its forthright decisions concerning crime, school prayer and civil rights. However, decisions reaffirming the right of jury trial, civil and criminal, have met with almost universal approval. The American people put a high value on trial by jury. They view it as their protection from arbitrary judicial conduct.

Since these petitioners last approached the Supreme Court, the right to trial by jury, in both civil and criminal actions, has been strengthened. We do not ask the Court to declare that litigants in a civil trial are entitled to a jury as a matter of right. But, the disposition of the first clause of the Amendment does not control the disposition of the second. Obviously, if the State Court had arbitrarily ruled:

> "We refuse to grant a judgment on the verdict in this case because we disagree with the jury's findings,"

there would be a clearcut case of denial of due process. While the State judges have been more circumspect in their pronouncements, we submit that this is exactly what has happened. While the situation is extreme, it is not isolated. Professor Leon Green has thoroughly spotlighted the problem:

> "The taking over of the jury's functions in negligence cases by appellate courts

> has been steadily progressing everywhere but, I believe, in no other American jurisdiction at such a pace and so completely as in Texas. * * * In a jurisdiction where jury trial is embedded in the constitution, and at a time when the intelligence of laymen has risen to such a high level, the change is not so easily accounted for.
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> "There is nothing to prevent this invasion of the jury's province except the self-restraint of the judges themselves. * * * The supreme power in a court system as in any other heirarchy inevitably increases with its exercise." Green, Jury Trial and Proximate Cause, 35 Tex. L. Rev. 357-358 (1958) (Emphasis supplied).[26]

Other writers have noted the tendency of the courts to substitute their opinion of the facts for the opinion of the jury.[27]

> "The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to

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[26] Professor Green's views are further expressed in Green, Jury Trial & Mr. Justice Black, 65 Yale L.J. 482, 485-486 (1956); Green, The Thrust of Tort Law: II, 64 W.Va. L. Rev. 115, 134-135 (1962); Green, Duties, Risks, Causation Doctrines, 41 Tex. L. Rev. 42, 70-74 (1962); Green, Observations: The Importance of Identifying The Issue, 42 Tex. L. Rev. 835, 840 (1964).

[27] Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751 (1957); Blum, Origin and Development of the Directed Verdict, 48 Mich. L. Rev. 555 (1950); Tongue, In Defense of Juries As Exclusive Judges of the Facts, 35 Ore. L. Rev. 143 (1956). See also Kreindler, The Jury System in Tort Cases, 51 A.B.A.J. 736 (1965); Kalven, The Dignity of the Civil Jury, 50 Va. L. Rev. 1055 (1964); Sacks, Preservation of the Civil Jury System, 22 Wash. & Lee L. Rev. 76 (1965).

> see that constitutional right preserved. * * * Our duty to preserve this one of the Bill of Rights may be peculiarly difficult for here it is our own power which we must restrain. * * * I believe that a verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy. * * * Appellate courts should be alert to insure the preservation of this constitutional right even though each case necessarily turns on its peculiar circumstances." Galloway v. United States, 319 U.S.372,407 (Dissenting opinion)(Emphasis supplied).

We do not seek to throw an impossible burden on the Supreme Court. Compared to the large number of felony convictions affirmed, the number of instances where state courts substitute their opinion of the facts for the findings of the jury is still quite small. But the trend is growing. "Two or three forthright decisions outlining the permissible limitations on jury trial as preserved by the 7th amendment" will go far to stem the tide. Green, Protection of Jury Trial in Diversity Cases, 35 Tex.L.Rev.768,771 (1957).

Jury trial is one of the fine checks and balances of our democratic society. The litigants are never forced to try their case before a jury, the jury is only called when a party expresses dissatisfaction with trial by judge. Jury trial is not perfect but the courts are not powerless to restrain unwarranted verdicts. They decide rules of evidence, lay the burden of proof and instruct the jury. New trials and remittiturs are

available when the court finds the verdict to be completely unreasonable or shockingly unconscionable in amount. But, to approve of the judiciary totally depriving the plaintiff of his day in court save in those limited instances where he cannot recover under any construction of the evidence is the opening blow to rip the substance away from the form. The public should not be deluded. This great institution should not be drained of vitality and left to stand as an empty facade.

In the final analysis, the tort law is much more than a fine drawn web of legal reasoning, it is the conscience of the community in action. Green, Tort Law: Public Law in Disguise 38 Tex.L.Rev.1,257,269 (1960). Not only does it provide compensation for those damaged by another, it encourages motorists to buy insurance, railroads to build overpasses and store managers to keep banana peels off the floor. It is the function of the courts and the legislature to set standards of conduct and to delimit the field of liability. However, when one citizen is pitted against another in a courtroom, who is less apt to become subjected to the influence of vested interests, who is better qualified to speak for the entire community, who under our system of government reserving all undelegated powers to the people is the better party to weigh the question of whether there has been any deviation from the contemporary standards of fair and reasonable conduct?

The hardest restraint of all is self restraint. It is impossible for juries to usurp the functions of judges but the process of usurping the jury's function has gone far. Clause One of the Seventh Amendment may not be essential to ordered liberty. But Clause Two is the very heart of the system

of trial by jury. We ask the interposition of the Supreme Court to stem the "gradual process of judicial erosion which in one hundred fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." Galloway v. United States, 319 U.S.372,397 (Dissenting opinion).

PRAYER

For the reasons given, your petitioners ask that this petition for a writ of certiorari be granted.

RESPECTFULLY SUBMITTED,

January 20, 1970

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